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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

INTERVINE OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT & CITY OF GLOUCESTER CITY,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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33 pp

QUESTIONS PRESENTED FOR REVIEW

1) Whether a recent Gloucester City, New Jersey, billboard speech ban conflicts with this Court's decision in *Metromedia v. San Diego*, 453 U.S. 490, (1981) and its progeny, thereby permitting broad, municipal-level censorship of commercial and non-commercial sign speech.

2) Whether the New Jersey Supreme Court committed reversible error in concluding that a simple severance of the time restrictions from Section 1604.12 of the Gloucester City, New Jersey, Zoning Ordinance, ruled by that Court to be unconstitutional, renders the remaining portion of the Ordinance's ban on outdoor sign speech constitutional, when the sign Ordinance is still impermissibly content-specific and fails to satisfy the strict scrutiny test.

3) In the alternative, if the said Opinion of the New Jersey Supreme Court is interpreted to require severance and deletion of Ordinance Section 1604.12 in its entirety from the Gloucester City Zoning Ordinance, whether the New Jersey Supreme Court committed reversible error by permitting Gloucester City to completely prohibit all off-site non-commercial outdoor sign speech.

CITATIONS OF THE CASE BELOW

The Judgment of the New Jersey Supreme Court is found at page A1 of the Appendix; there was no formal written Opinion because the Court relied upon the written Opinion of the Superior Court of New Jersey, Appellate Division, found beginning at page A2 of the Appendix.

JURISDICTIONAL STATEMENT

Jurisdiction of this Honorable Court is conferred by 28 U.S.C. § 1257. The date of the Order sought to be reviewed is July 10, 1996 and the date same was filed is July 11, 1996.

STATUTORY PROVISIONS INVOLVED

City of Gloucester City, New Jersey Zoning Ordinance Article 1601 et seq. is found at Page A11 of the Appendix.

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No.

IN THE

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INTERVINE OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT & CITY OF GLOUCESTER CITY,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

STATEMENT OF THE CASE

The parties to this proceeding are fully identified in the caption of the case in this Court. Petitioner, Intervine Outdoor Advertising, Inc. ("Intervine") of Cherry Hill, New Jersey, entered into an agreement with Holt Cargo Systems ("Holt") to lease certain premises located immediately adjacent to the Walt Whitman Bridge, an interstate highway over the Delaware River connecting Philadelphia with South Jersey, in order to construct three, free-standing, double faced, 960 square feet outdoor pole signs to display both commercial and non-commercial messages directly and only to Bridge traffic. Gloucester City has totally banned the billboards here and elsewhere throughout the City. The signs' proposed location is exclusively within the City's Industrial/Port & Cargo Zones, having no residences, but replete with huge

container-cargo ships, cranes, Holt's marine terminal complex and warehouses and the interstate highway system of the Walt Whitman Bridge. The pole signs stand approximately 160 feet tall and are designed to be visible only to passing Bridge traffic, and not visible to persons in Gloucester City. There are currently signs on the Philadelphia side of the Bridge.

Intervine formally applied for size, lighting, etc. variances under N.J.S.A. 40:55D-70 from the Gloucester City Zoning Board of Adjustment Sign Ordinance (See Page A-11 of Appendix). The Zoning Board rejected Intervine's Application and Intervine filed a Complaint in Lieu of Prerogative Writ; the Law Division issued a final written Order dismissing Intervine's Complaint. Intervine filed a Notice of Appeal with the Appellate Division of the Superior Court of New Jersey; the Appellate Division held that portions of the Ordinance's speech ban were indeed unconstitutional but ruled that severance of the offending portions cured the constitutional defect (See Page A-2 of Appendix). A Notice of Appeal with a Petition for Certification was filed in the New Jersey Supreme Court, which denied Intervine's Petition for Certification and dismissed its Appeal on July 11, 1996 in reliance upon the Appellate Division's Opinion (See Page A-1 of Appendix).

In its original Complaint in Lieu of Prerogative Writ, in each Brief before each Court below, and during all oral arguments, Intervine preserved for appeal before this Court its constitutional arguments: Intervine posited that the instant Gloucester City Zoning Ordinance is fatally flawed because the City's almost complete ban upon all off-premises sign advertising speech is unconstitutional pursuant to the U.S. Constitution, First Amendment and the N.J. Constitution, Article I, paragraph 6. Each Court below considered these constitutional issues beginning at the Trial Court level and found at the Superior Court, Appellate Division's Opinion at page A-2 of the attached Appendix; and at the New Jersey Supreme Court's Judgment found at page A-1 of the attached Appendix.

The Appellate Division and the Supreme Court both upheld Intervine's position that the determination of the constitutionality of the instant Zoning Ordinance vis-a-vis non-commercial usage was indeed ripe, contrary to the Respondents' arguments and the determination of the Trial Court. The two Courts also supported Intervine's position that the proposed signs clearly display non-commercial speech including the New Jersey State Tax Amnesty Program, Blood Drives, Political Campaigns, New Jersey State Aquarium and multiple social, political and charitable causes.

Moreover, the two Lower Courts upheld Intervine's position that the instant Zoning Ordinance as it relates to non-commercial speech is indeed unconstitutional: both Courts ruled that the Ordinance Section 1604.12 *time limitation* upon non-commercial speech, not found on City commercial speech regulations, was unnecessary and constituted an unconstitutional infringement upon protected non-commercial speech. However, the New Jersey Supreme Court committed reversible error by ruling that a simple severance of the offending time restrictions from the Zoning Ordinance would render the remaining parts constitutional as they relate to non-commercial speech.

Lastly, the Appellate Division and the New Jersey Supreme Court in reliance thereupon, upheld Intervine's position that Section 1604.12 of the Zoning Ordinance was content-specific and therefore subject to the Court's most exacting scrutiny. But the lower Courts improperly concluded that the instant Zoning Ordinance was the least restrictive means available to advance a compelling governmental interest since there is no evidence that traffic, aesthetics or safety are genuinely disadvantaged or that less restrictive alternatives were considered. The Court conducted a "*Bell*" hearing pursuant to *Bell v. Twp. of Stafford*, 541 A. 2d 692 (N.J. Sup. Ct. 1988) in which Gloucester City offered testimony as to the rationale behind its Ordinance which, subject to very limited exceptions, effectively prohibits all off-site outdoor sign speech inside the City. Testimony elicited established the City considered *no* other alternatives to the present broad ban. The

New Jersey Supreme Court ruled in *Bell* that such a ban was unconstitutional. Because the City did *not* evaluate any other less restrictive means to reach its goals this case is essentially identical to the outdoor sign ban held unconstitutional in *Metromedia v. San Diego*, 453 U.S. 490 (1981).

ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI

Where a municipality in the State of New Jersey effectively bans a regulated, taxed, and lawful industry, which displays both commercial and non-commercial speech via outdoor signs, substantial questions under both the United States and the New Jersey Constitutions are implicated. If the City of Gloucester City, a fully urban locale with use-compatible Industrial/Port & Cargo Zones, abutting a major interstate river artery utilized only for heavy commercial transportation and spanned by an interstate highway bridge, is permitted to enforce an overly broad sign speech ban predicated upon ephemeral and unsubstantiated notions of traffic safety and aesthetics, then all such speech in New Jersey, and elsewhere, is threatened by localized, ad hoc censorship and elimination. This outright ban severely limits the First Amendment expression of commercial and non-commercial speech, the promotion of regional commerce, property rights, and raises public policy and other substantial issues which must be resolved by this Honorable Court.

Judicial review should determine whether any municipality in New Jersey has the unilateral ability to select and eliminate broad categories of speech within its borders even when such messages are not visible to its inhabitants. The New Jersey State Legislature declared at N.J.S.A. 27:5-6 that regulation of Outdoor Signs must balance "safety and natural scenic beauty" with "promoting development and economic vitality and facilitating the flow of speech and expression of which providing messages of commercial, public and social value conveyed through the medium of roadside signs and outdoor advertising." Gloucester City's ban does not satisfy this test.

The Opinion of the Appellate Division of the Superior Court of New Jersey, and the New Jersey Supreme Court in reliance thereupon, ruled that indeed the relevant portions of the Zoning Ordinance *sub judice* were unconstitutional and that the Zoning Ordinance improperly derogated non-commercial speech, the most protected form of speech. However, neither lower Court went far enough since the Zoning Ordinance at issue is still impermissibly content-specific, subject to exacting scrutiny to determine if it both genuinely serves compelling governmental interests and is truly in the least restrictive means possible drawn.

Gloucester City's Master Plan/Zoning Ordinance includes Sub-Section XVI, "Permitted Signs", within the confines of the City. The instant sign Ordinance creates a total ban on all off-premises commercial and non-commercial signs, thereafter enumerating very limited exceptions to the ban. (See Part III of Appendix).

The Appellate Division, and the New Jersey Supreme Court in reliance thereupon, ruled Section 1604.12 of the Zoning Ordinance was clearly suspect because it categorizes and enumerates "acceptable" non-commercial speech and then the Courts ruled, unconstitutionally confines same to a limited time period. Erroneously, the lower Courts ruled that a simple severance of the offending temporal portion of that Ordinance cures the constitutional defect. However, severing the time limitations does not make the Ordinance any less content-specific and it remains constitutionally invalid: the municipality still selects only that non-commercial speech which formally "announces or advertises" a specific "political, educational, charitable, civic, professional, religious or like campaign or event". The protest sign which was permitted in *City of Ladue v. Gilleo*, 512 U.S. 43 (1944) ("Peace in the Gulf") would clearly not be permitted under this Ordinance. The Ordinance permits "announcing or advertising" an "event or campaign" but is limited to a specific and/or formal fundraiser or meeting; the non commercial message upheld in *Ladue*, *supra* was simply one person's informal, unsanctioned, commentary about the day's headlines.

In Gloucester City, however, the local politicians or even a town clerk arbitrarily act as self-appointed speech censors, choosing what is a specific "campaign or event"; what is "religious, civic, political, etc."; and what is an "announcement or advertisement." Such a regime cannot withstand the enacting scrutiny of this Honorable Court in the application of established precedents.

There is no allowance in Zoning Ordinance Section 1604.12 for outdoor signs of, for example, an unusual or private comment: a sign: "Happy Valentine's Day to my Wife of Fifty Years" is not permitted under the Ordinance since is not "political, educational, charitable, etc." A sign: "Gloucester City Town Fathers Always Raise Taxes Too Much" would not be permitted since it is not announcing a specific "campaign or event"; however, it does constitute an on-going informal commentary of general, personal dissatisfaction exactly like the message upheld in *Ladue*, *supra*. Although distasteful, would a sign: "Worship Satan" be permitted? Is it a "religion"? How is it an "event or campaign"? Although unusual, would a sign: "O.J. Simpson is Great!" be permitted; is it an event; is it political, educational, etc.? What goal does the City promote by affirmatively enumerating the speech it finds useful; why does it not simply permit *all* non-commercial speech? Allowing only speech which "announces or advertises" a specific "campaign or event" sets the City up as speech-content arbiter but not allowing all other speech is a fatal flaw.

"Today the central organizing concept of First Amendment doctrine is the distinction between content-based regulations and content-neutral ones. Content-based regulations will be almost never constitutional..." 44 *Hastings Law Journal*, 881 (1993). Content-specific Ordinances shall be closely scrutinized since the government selects the topics of public discourse and such regulation is strictly construed under both the United States Constitution and the New Jersey State Constitution. "For a content-based restriction in a traditional public forum to be valid, the restriction must pass muster under the strictest scrutiny: it must be necessary to serve a compelling

State interest...narrowly drawn to achieve that end". *Horizon Health Center v. Felicissimo*, 638 A. 2d. 1260 (N.J. Sup. Ct. 1994), quoting *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37 (1983).

The Appellate Division's Opinion, and thus the New Jersey Supreme Court's reliance thereupon is not clear: it appears on the one hand to state that severing the time restrictions *only* from Ordinance Section 1604.12 is sufficient and on the other hand, the last full sentence appears to hold that the *entire* Ordinance Section 1604.12 should be severed (last full sentence of the Appellate Division's Opinion). If the Opinion is interpreted to delete Ordinance Section 1604.12 *entirely*, then all off-site non-commercial speech (permitted only via Section 1604.12) is totally excluded City-wide and the Ordinance must be held to be facially invalid as a total ban. The Zoning Ordinance must give non-commercial speech the same latitude and freedom as commercial speech and the City clearly cannot prefer commercial speech over non-commercial speech. *Metromedia*, supra.; *Rappa v. State of Delaware*, 18 F. 3d. 1043 (3rd Cir. 1994).

Conversely, if the Opinion is interpreted to delete the relevant temporal restrictions *only* and leave intact the remainder of Zoning Ordinance Section 1604.12, (thereby permitting the *enumerated* non-commercial speech but without time restrictions,) the Ordinance remains invalid since it still improperly enumerates "acceptable" non-commercial speech. Gloucester City selectively censors which speech it will permit and decides what is "political, religious, etc.," and further decides what is a specific "campaign or event" and what is an "announcement or advertisement".

This Court, using the strict scrutiny test, enunciated in *Ladue*, *supra*. should find that no compelling Gloucester City governmental interest is genuinely served by this total speech ban and that the instant Zoning Ordinance is not narrowly drawn. Excluding personal speech but permitting arbitrarily defined speech is illogical and does not serve any compelling interest. Further, excluding constitutionality-protected speech

in the City's Industrial/Port & Cargo Zones, with huge ships, cranes and marine warehouses, hardly serves the proffered interests of traffic safety, property values or aesthetics, particularly when such speech is only visible to bridge traffic on an interstate highway.

As this Court recently found in *44 Liquormart, Inc. v. Rhode Island*, ___ U.S. ___, 116 S. Ct. 1495 (1996) the regulating body bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so to a *material degree*. Likewise, there is no justification for such broad sign speech limitations everywhere in Gloucester City, particularly the proposed fully industrialized location and especially when the signs are not visible to Gloucester's residents. And as noted above, the Gloucester City Planning Board concedes that it never even considered a less restrictive means to target its goals.

Further illustrating the lower New Jersey Court's misapplication of the law to the Ordinance, they ignore the companion Gloucester City Zoning Ordinance Section 1604.1 which permits *all* "signs erected by governmental agencies". Such a broad exception favoring government signs was considered improper under *Rappa*, supra; the Third Circuit found the government had no greater ability to post all of its signs than would a private user and that it did not have a monopoly on censorship of signs such that every governmental sign would be permitted regardless of content or need. However, severing Section 1604.1 would not render the instant Zoning Ordinance constitutional since doing so would effectively *prohibit* all government signs; only amendment will work.

The Gloucester City Zoning Ordinance at companion Section 1604.6 also improperly favors one form commercial speech over another by permitting signs for construction work being done on a premises. That Ordinance favors construction work but does not permit, for example, an architect, accountant or roofer to place a sign at the location where he/she is doing a great deal of work. There is scant logic in permitting such broad commercial speech in residential areas for home

contractors when all other such residential or other Zone speech/advertising is banned in terms of aesthetics, etc. This Ordinance speech exception is similar to the issue raised in *City of Cincinnati v. Discovery Network* 502 U.S. 410 (1993), in which this Court held that a partial ban on commercial speech did not genuinely serve aesthetics or safety. Zoning Ordinance Section 1604.6 clearly favors commercial speech over non-commercial speech and certain types of commercial speech over other types, also contrary to *Metromedia*, supra. Severing Section 1604.6 would not render the Ordinance constitutional; only amendment will work.

With respect to the lower Court's proposed "solution" of severance, the validity of a Zoning Ordinance from which a provision has been severed is contingent upon whether the remaining portion is functionally self-sufficient and still contains the essentials of a complete enactment. *Gardens v. City of Passaic*, 327 A.2d 250 (N.J. Super. Ct., L. Div. 1974); *N.J. Chapt.; Am I.P. v. N.J. State Bd. of Prof. Planners*, 227 A. 2d 313 (N.J. Sup. Ct. 1962).

But as the Third Circuit stated in *Rappa*, *supra*, at 1072: "eliminating the offending exception (to a speech ban) would mean that we would be requiring the State to restrict *more* speech than it currently does...To our knowledge, no Court has mandated issuance of an injunction such as that, and we decline to be first." And as this Court stated in *Ladue*, *supra* at ___, 114 S. Ct. 2038 at 2043: "...the City might theoretically remove the defects in the Ordinance by simply repealing all the exemptions. If, however, the Ordinance is also vulnerable because it prohibits too much speech, that solution would not save it." Assuming arguendo the Gloucester City Zoning Ordinance may permissibly enumerate non-commercial speech, the City can do so only by formal amendment and not by severance; however, Intervine's rights are vested and remand to permit amendment should not be allowed at this late date.

Only the intervention of this Honorable Court can redress the wrongs done below and bring the Gloucester City, New

Jersey Ordinance into conformity with the settled law of the land as embodied in *Metromedia, supra.* and its progeny.

CONCLUSION/RELIEF REQUESTED

Petitioner seeks a determination that the Gloucester City Ordinance, as interpreted by the Lower Courts, is unconstitutional and that this case be remanded for entry of an appropriate Order providing for the variance sought by Petitioner in its original Application. If the Gloucester City Zoning Ordinance under which Intervine made its variance Application is held unconstitutionally void, Intervine is entitled to the relief requested therein and the status of the Gloucester City Master Plan/Zoning Ordinance *at the time of the Application* is controlling. If the City now adopts a new Zoning Ordinance restricting the use or bulk requirements necessary to permit the proposed use, then those requirements will simply constitute a non-conforming but vested, permitted use such as provided in N.J.S.A. 40:55D-68.

In *Bell*, supra, the New Jersey Supreme Court invalidated a similar Zoning Ordinance and noted that Stafford Township was not prevented from enacting an Ordinance satisfying the constitutional imperatives; however, the Court did not stay its decision pending reenactment of such an Ordinance; *see also STC Corp. v. Planning Board of Hillsborough*, 476 A. 2d 888 (N.J. Super. Ct., App. Div. 1984) in support.

There is no legal or equitable requirement that this Court make available to Gloucester City an additional opportunity to revise or reexamine its Zoning Ordinance to cure the invalidity. Here, Intervine first applied for use and other variances and has exhausted all of its administrative remedies before the Zoning Board of Adjustment and only then appealed. The situation is unlike and distinguishable from those in either *Exxon Co., U.S.A. v. Livingston Township in Essex County*, 489 A. 2d 1218 (N.J. Super. Ct., App. Div. 1985), or the *Deal Gardens, Inc. v. Board of Trustees of Lock Arbor*, 226 A. 2d 607 (N.J. Sup. Ct. 1967) case upon which it relies in which those Courts permitted amendment.

Vesting will avoid what Justice Brennan, in *San Diego Gas & Electric v. San Diego*, 450 U.S. 621 (1987), said was advice given to the City attorney about how to respond (and frustrate an Applicant) when a land use regulation is stricken by a Court: "if all else fails, merely amend the regulation and start over again."

Respectfully submitted,

KATZ, ETTIN, LEVINE, KURZWEIL
& WEBER, P.C.
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DATED: Oct. 4, 1996

APPENDIX

SUPREME COURT OF NEW JERSEY
C-1232 September Term 1995
42,339

INTERVINE OUTDOOR ADVERTISING, INC.,

Plaintiff-Petitioner,

v.

CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT, CITY OF GLOUCESTER CITY,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5193-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Alan B. Handler, Presiding Justice, at Trenton, this 10th day of July, 1996.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5193-94T3

INTERVINE OUTDOOR ADVERTISING, INC.,

Plaintiff-Appellant,

v.

CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT and CITY OF GLOUCESTER CITY,

Defendants-Respondents.

Argued March 26, 1996 - Decided May 02 1996

Before Judges Michels, Villanueva, and Kimmelman.

On appeal from the Superior Court of New Jersey, Law Division, Camden County.

Martin S. Ettin argued the cause for appellant (Katz, Ettin, Levine, Kurzweil & Weber, attorneys; Andrew S. Genetta and Mr. Ettin, on the brief).

Barry J. Beran argued the cause for respondent City of Gloucester City Zoning Board of Adjustment (Beran & Beran, attorneys; Gail R. Beran and Mr. Beran, on the brief).

M. James Maley, Jr. argued the cause for respondent City of Gloucester City (Maley, Williamson, Hayden & Gmerek, attorneys; Mr. Maley and Charles W. Wigginton, on the brief).

The opinion of the court was delivered by

KIMMELMAN, J.A.D (temporarily assigned).

Plaintiff Intervine Outdoor Advertising, Inc. appeals from a judgment of the Law Division which affirmed the denial by defendant City of Gloucester City Zoning Board of Adjustment (Board) of plaintiff's application for a use and bulk variance to construct three freestanding billboards on property it intends to lease adjacent to the New Jersey approach to the Walt Whitman Bridge. Plaintiff's complaint in lieu of prerogative writs also joined as a defendant the City of Gloucester City (City), contending that the zoning ordinance was invalid because the City had not reexamined its master plan and zoning regulations within six years as required by *N.J.S.A.* 40:55D-89, and that, if not invalid, the zoning ordinance was otherwise unconstitutional. The Law Division rejected these claims, upholding the validity of the zoning ordinance.

We affirm the denial of plaintiff's application for a use and bulk variance and affirm that portion of the judgment entered April 14, 1995, which upheld the City's compliance with *N.J.S.A.* 40:55D-89 and which also upheld the constitutionality of the zoning ordinance insofar as it regulates commercial speech with respect to the sign regulations. The trial court did not reach the question as to the constitutionality of the sign regulations applicable to noncommercial speech. However, we find unconstitutional that part of the sign regulations which limits noncommercial speech contained in signs to a temporary basis not to exceed a consecutive period of sixty days in any calendar year. Since we do not find the constitutional defect to require invalidation of the entirety of the sign regulations contained in the zoning ordinance, but only to require severance of the offending language from the noncommercial sign regulations, the remaining provisions survive.

Plaintiff is a company engaged in erecting and maintaining freestanding, outdoor advertising structures. It has entered into an arrangement with Holt Cargo Systems, Inc., the owner of the subject property, to lease the property for the erection of billboards. The property site is located in the Port and Cargo Handling Zone of the City's zoning ordinance, wherein the permitted uses pertain to the maintenance of piers, warehouses, and like facilities for the operation of businesses related to the receipt, temporary storage, and transfer of cargo. A use not specifically permitted in that particular zone, such as the erection and maintenance of signs, is prohibited under the ordinance. The site is also located in the Shoreline Overlay District, which includes lands within 500 feet of the Delaware River shorelines. Among the stated purposes for creating this district are the encouragement of public use and enjoyment of the shorelines and the enhancement and increase of views and access to the water. An objective of the City's 1985 master plan is eventually to rezone the waterfront area from industrial to mixed-use development and to clean up and beautify the entrances to the City by various techniques, which include prohibiting new billboards and attempting to retire old ones.

Plaintiff proposes to construct three double-faced, steel, freestanding pole signs, one on the south side of the Walt Whitman Bridge and two on the north side. Each sign would be externally lit at the bottom, measuring 16 feet by 60 feet, and would be located approximately 30 feet above the bridge roadway, approximately 90 feet above the ground, and approximately 30 feet from the bridge rights-of-way. In addition to commercial advertisements, plaintiff proposes to use the reverse side of the signs for noncommercial advertisements and messages such as promoting the New Jersey State Aquarium, the New Jersey State Tax Amnesty Program, the Franklin Institute, and political campaigns. Similar noncommercial billboards are located adjacent to the bridge on the Pennsylvania side.

After considering the application and the testimony presented in support and against thereof, the Board concluded

that plaintiff's application was a substantial departure from the signage requirements of the zoning ordinance, that the application could not be granted without substantial detriment to the public health, safety, and welfare of the City, and that plaintiff had not shown any special reasons why the application should be granted in view of the detriments. *See N.J.S.A.* 40:55D-70d.

We are satisfied, based upon the thorough and well-reasoned letter opinion of Judge Theodore Z. Davis, that the Board's denial of plaintiff's application for a use and bulk variance finds support in the evidence and was not arbitrary, capricious, or unreasonable. *Booth v. Board of Adj. of Rockaway,* 50 *N.J.* 302, 306 (1967). Judge Davis also correctly held that the City had complied with *N.J.S.A.* 40:55D-89, which provides in pertinent part:

> The governing body shall, at least every six years, provide for a general reexamination of its master plan and development regulations by the planning board, which shall prepare and adopt by resolution a report on the findings of such reexamination, a copy of which report and resolution shall be sent to the county planning board and the municipal clerk of each adjoining municipality. . . .

On April 15, 1991, within the six-year statutory period, the City adopted resolution #67, which reads:

> WHEREAS, the Planning Board of the City of Gloucester City has conducted a review and re-examination of the existing Master Plan for the City of Gloucester City;
>
> WHEREAS, the Planning Board of the City of Gloucester City has recommended that the Mayor and Council of the City approve and adopt the existing Master Plan for the City;
>
> WHEREAS, the Mayor and Council is satisfied that the Planning Board has conducted a general re-examination of the City's Master Plan and

> Development Regulations and has reported to Mayor and Council its recommendation that the existing Master Plan be readopted;
>
> NOW, THEREFORE, BE IT RESOLVED, by Mayor and Council of the City of Gloucester City that the existing Master Plan is hereby readopted in accordance with N.J.S.A. 40:55D-89 and that the Master Plan shall continue in full force and effect unless otherwise provided by law.

Although proof was not submitted that the planning board had prepared a formal report and that a copy of the report had been submitted to the county planning board, sufficient evidence was submitted to the trial court showing that the master plan and zoning ordinance had been reviewed and examined continually by the planning board over the years in question. Such proof raised a debatable question as to the reexamination of the master plan and zoning regulations and, therefore, was sufficient to overcome the statutory rebuttable presumption of unreasonableness required by *N.J.S.A.* 40:55D-89.1. The rebuttable presumption of unreasonableness having been overcome, the presumption of validity inherent in the municipal enactment then reattaches, as found by Judge Davis. *See Lionshead Woods Corp. v. Kaplan Bros.*, 243 *N.J. Super.* 678, 684-85 (Law Div. 1990).

With respect to the constitutionality of the sign regulations, we agree with Judge Davis's reasoning and conclusion that the sign regulations applicable to commercial speech were not constitutionally infirm. Judge Davis held a so-called "Bell hearing" pursuant to *Bell v. Stafford Township*, 110 *N.J.* 384, 396-97 (1988), and determined that there were compelling governmental interests that *supported the regulations applicable to commercial signs*. Judge Davis did not reach the question as to whether the City's sign regulations applicable to noncommercial speech pass constitutional muster. However, we find the sign regulations applicable to noncommercial speech to be unconstitutional.

The City's zoning ordinance, Section 1604, subsection 12, applicable to noncommercial signs other than governmental, directional, and traffic control signs and devices, permits:

> Temporary signs announcing or advertising any political, educational, charitable, civic, professional, religious, or like campaign or event for a consecutive period not to exceed sixty (60) days in any calendar year, providing they do not exceed fifty (50) square feet in size.
>
> [Gloucester City, N.J., Ordinance 81 (April 2, 1987).]

Thus, noncommercial signs and billboards conveying a political message or, for example, promoting the New Jersey Tax Amnesty program or urging visits to the New Jersey State Aquarium must be temporary in nature, not to exceed sixty days in any calendar year. The zoning ordinance imposes no time limitation, however, upon commercial signs. In effect, the zoning ordinance does not give noncommercial speech the same latitude or freedom as afforded to commercial speech. While we have no quarrel with defendants' overall desire to restrict the erection of billboards because of their generalized concern for safety and aesthetic purposes, *see Bell v. Stafford Tp.*, *supra*, 110 *N.J.* at 393 (1988); *State v. Miller*, 83 *N.J.* 402, 409 (1980); *United Advertising Corp. v. Borough of Metuchen*, 42 *N.J.* 1, 5-6 (1964), we must question the limitation on the right of free speech implicit in the requirement that noncommercial signs be temporary in nature.

In weighing the constitutionality of the zoning ordinance as applied to noncommercial signs, a court must focus upon whether the temporal restrictions imposed by the municipality upon noncommercial signs are content-neutral or content-based. *Rappa v. New Castle County*, 18 *F.*3d 1043, 1053 (3d Cir. 1994).

If the restriction is content-based, then the regulation is subjected to the most exacting scrutiny, and the municipality is required to show that the regulation is necessary to serve a

compelling municipal interest and that it is narrowly drawn to achieve that end. *Boos v. Barry*, 485 *U.S.* 312, 321, 108 *S. Ct.* 1157, 1164, 99 *L. Ed.* 2d 333, 344-45 (1988); *Whitton v. City of Gladstone, MO.*, 54 *F.*3d 1400, 1408 (8th Cir. 1995); *Horizon Health Ctr. v. Felicissimo*, 135 *N.J.* 126, 140 (1994). If the restriction is content-neutral, then it is analyzed under a time, place and manner standard to determine whether it serves a significant governmental interest and leaves open ample alternative channels for communication of the information. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 *U.S.* 748, 771, 96 *S. Ct.* 1817, 1830, 48 *L. Ed.* 2d 346, 363-64 (1976); *Whitton, supra*, 54 *F.* 3d at 1403; *Rappa, supra*, 18 *F.* 3d at 1054; *McCormack v. Township of Clinton*, 872 *F. Supp.* 1320, 1323 (D.N.J. 1994); *State v. Miller; supra*, 83 *N.J.* at 412.

Here, the temporal restrictions placed upon noncommercial speech clearly impose a content-based regulation on subsection 12 of Section 1604 of the zoning ordinance. It is the wording or message sought to be conveyed by a given sign that dictates the durational life of the sign. Hence, the regulation in question is clearly content-based. *Metromedia, Inc. v. City of San Diego*, 453 *U.S.* 490, 516, 101 *S. Ct.* 2882, 2897, 69 *L. Ed.* 2d 800, 820 (1981); *Whitton, supra*, 54 *F.* 3d 1403-04; *Rappa, supra*; *National Advertising Co. v. Town of Babylon*, 703 *F. Supp.* 228, 238-39 (E.D.N.Y. 1989), *aff'd in part, rev'd in part*, 900 *F.*2d 551 (2d Cir. 1990), *cert. denied*, 498 *U.S.* 852, 111 *S. Ct.* 146, 112 *L. Ed.* 2d 112 (1990).

We fail to discern the compelling governmental interest sought to be protected by the blanket restriction making temporary all forms of noncommercial signs. In our view, the relegation of all noncommercial signs to a temporary life creates an impermissible distinction between commercial and noncommercial speech. *Metromedia, Inc., supra.*

As said in *National Advertising Co., supra*,

> [I]n order to pass constitutional muster, a sign ordinance, to the extent that it regulates non-commercial speech, may neither regulate such speech more

> stringently than it does commercial speech nor demonstrate a preference for the subject matter of certain non-commercial speech over other non-commercial speech.
>
> [703 *F. Supp.* at 237.]

Accordingly, the temporal restrictions contained in subsection 12 of section 1604 of the sign provisions of the zoning ordinance are unconstitutional *U.S. Const.* amend. I; *N.J. Const.* art. 1, ¶ 6; *Metromedia, Inc.*, *supra*; *Whitton*, *supra*; *Rappa*, *supra*; *National Advertising Co.*, *supra*.

We make no ruling with respect to the square-footage limitation imposed on noncommercial signs. That issue has not been raised or argued. However, we do note a pertinent statement in *State v. Miller*, *supra*:

> Limitations on the size of a sign may be imposed if the allowable square footage is not determined in an arbitrary manner. The size limits, if any, must be large enough to permit viewing from the road, both by persons in vehicles and on foot. Inadequate sign dimensions may strongly impair the free flow of protected speech.
>
> [83 *N.J.* at 416.]

The United States District Court in *National Advertising Company*, *supra*, rather than striking the entirety of the municipal ordinance found to make an unconstitutional distinction between commercial and noncommercial speech, narrowly tailored its constitutionally-based injunctive relief, holding only that the municipality may not enforce that portion of the ordinance that disadvantaged noncommercial speech. 703 *F. Supp.* at 240. On appeal, the Second Circuit reversed the District Court only with respect to the limitation of the constitutional ban to that portion of the ordinance that disfavored noncommercial speech. There was no severability clause in the ordinance that would justify saving the remaining portions, and hence, the entire ordinance was struck down. 900 *F.*2d at 557.

Fortunately for defendants, the ordinance in question before the court does have a severance clause which provides:

> Should any section or provision of this Ordinance for any reason be declared invalid by the Courts, such decision shall not effect [sic] the validity of this Ordinance as a whole or any other part thereof.

The presence of such a clause raises, at the minimum, a rebuttable presumption of severability. *Helmsley v. Borough of Fort Lee*, 78 *N.J.* 200, 237 (1978), *appeal dismissed*, 440 *U.S.* 978, 99 *S. Ct.* 1782, 60 *L. Ed.* 2d 237 (1979), *clarified*, 82 *N.J.* 128 (1980). We believe the commercial sign provisions of the ordinance can stand in the absence of the time restrictions contained in the noncommercial sign provision. In effect, the absence of the temporal restrictions contained in subsection 12 of Section 1604 will not preclude noncommercial signs and will not truncate the entirety of the sign provisions into incomprehensibility. We shall observe the severance clause.

For the reasons set forth, we affirm the judgment of April 14, 1995, entered by Judge Davis, but find subsection 12 of Section 1604 of the City's zoning ordinance to be unconstitutional and, therefore, unenforceable.

ARTICLE XVI

SIGNS

SECTION 1601. PURPOSE. The purpose for this Article shall be the creation of a system of regulations for the review, erection and maintenance of signs within the City of Gloucester City.

SECTION 1602. DEFINITIONS. For the purpose of this Article the following definitions shall apply:

1. Banner sign. A temporary sign composed of lightweight material either enclosed or not enclosed in a rigid form secured or mounted so as to allow movement of the sign caused by movement in the atmosphere.

2. Building facade and building facade area. That portion of any exterior elevation of a building extended from grade to the top of the parapet wall or eaves and the entire width of the building elevation.

3. Changeable copy sign. A sign on which any manual, mechanical, or lightning effects can have its copy or message changed from any reworking of the sign.

4. Free standing sign. A pole, ground, or pylon sign not attached to a building or structure.

5. Functional sign. A directional sign; a sign indicating the location of rest rooms, telephones, first aid stations, and similar public convenience facilities; and signs located on mechanical dispensing equipment that identifies a product.

6. Marquee or canopy sign. Any sign attached to a fixed shelter or roof extending over a building line which is supported by the building to which it is attached.

7. Mobile sign. A sign not permanently attached to the ground or a building including any sign mounted on or attached to a vehicle which is not capable of

self-propulsion and registered with the New Jersey Division of Motor Vehicles.

8. Parapet. The portion of a building wall that rises above the roof level.

9. Pole or pylon sign. A sign mounted on, or supported by or suspended from a free-standing column, pipe or pole.

10. Projected sign. A sign casted, reflected or shown on a wall screen, or other surface whether for a continuous period or not.

11. Roof sign. A sign erected upon, against, or directly above a roof or on top of or above the parapet of a building.

12. Sign. A name, identification, description, illustration, or any other visual display which is affixed to, painted on, or represented directly or indirectly, upon any building, structure or land and which directs attention to an organization, business, product, service or individual.

13. Sign area. The entire space within a sign's continuous perimeter enclosing the extreme limits of all words, devices, or emblems but not passing through or between any adjacent elements. In computing the area of a sign with two (2) display surfaces, the area of the larger surface shall be considered the sign area. The area shall be computed by adding the total surface area of the sign and dividing by the number of display surfaces utilized by the sign. The display surface of a sign shall mean all side and faces of a sign that can be viewed from one (1) location.

14. Under canopy signs. A sign attached to the underside of a canopy.

15. Wall sign or facade sign. A sign attached to or erected against the wall of a building with the face in a parallel plane to the place of the building wall.

SECTION 1603. GENERAL REGULATIONS. The following regulation shall govern signs for all uses within the City:

1. All signs shall be subject to the provisions of the building, construction, maintenance, and fire codes of the City.

2. The text of all signs shall be limited to identification and functional purposes only. Identification signs shall contain the principal name of the establishment, firm or proprietor, its address, and a brief description of the goods or services offered. The text of a sign may also include a logogram or symbol of the use which it identifies.

3. The provisions of this Article shall not apply to works of art, statues, sculpture, fountains, holiday decorations and similar objects which do not fall within the definition of a sign contained in Section 1402 of this Article.

4. Maintenance. The area surrounding a sign shall be kept clean, free of litter, and landscaped. Whenever a sign shall become structurally unsound or a hazard to the public or a building, the building inspector shall order that the sign be made safe or removed. Such order shall be complied with within ten (10) days of the receipt therof by the person owning or using the

5. No sign except functional signs, shall be located within twenty (20) feet of the existing or proposed right-of-way of any public road or street.

6. No sign shall exceed twenty (20) feet in height.

7. No wall sign shall extend beyond the building facade on which it is mounted.

8. All signs shall conform to the provisions of Title 27 of the New Jersey State Statues.

9. No sign shall be erected or placed in a position which will cause danger to traffic on a street or within a parking lot by limiting the vision of drivers or obstructing the flow of traffic.

10. Signs advertising or identifying a business or use no longer in existence or a product no longer available shall be promptly removed.

11. No sign shall be erected containing information on it which states or implies that a property may be used for any purpose not permitted under the provisions of the City's Zoning Ordinance as it applies to the property on which the sign is located.

12. No sign shall be illuminated between the hours of 10 p.m. and 7 a.m. the following morning, unless the business or use so advertised is open to the public later than 10 p.m. in which case the establishment may keep its sign illuminated until the business closes, but not after.

SECTION 1604. PERMITTED SIGNS. the following signs shall be permitted within the City of Gloucester in accordance with the provisions of this Article:

1. Signs erected by governmental agencies; court or public notices; traffic control devices approved or installed by the appropriate governmental agencies; and flags, emblems, and insignias of governmental and religious institutions.

2. One (1) non-illuminated or white light sign not exceeding nine (9) inches by eighteen (18) inches and either free standing or affixed to a building which:

   a. Contains a message of caution, pertains to tresspassing, identifies a driveway or bears a relatd cautionary text.

b. Identifies the name and occupation of the practitioner of a profession or trade.

3. One (1) non-illuminated or white-lighted non-flashing sign for schools, churches, hospitals, clubs, lodges, or other similar use provided that the size of any one (1) side of the sign shall not exceed twelve (12) feet. When a building or lot fronts on more than one (1) street, an additional sign may be erected which meets the requirements of this paragraph.

4. One (1) non-illuminated real estate sign advertising the sale or rental of a building or lot provided such sign does not exceed twelve (12) square feet. When a building or lot fronts on more than one (1) street, an additional sign may be erected which meets the requirements of this paragraph.

5. One (1) non-illuminated real estate sign bearing the word "SOLD" or "RENTED" with the name of the person or firm affecting the sale or rental, provided such sign does not exceed twelve (12) square feet.

6. One (1) non-illuminated sign bearing the name and profession or trade for each person or firm performing construction or repair work on the premises, provided such individual signs do not exceed twelve (12) square feet in area, and are promptly removed upon completion of the work.

7. For business, office, commercial/industrial, and institutional uses: functional signs as defined in Section 1601, provided that no functional sign shall exceed twelve (12) square feet in sign area and that no functional sign shall contain advertising.

8. For business, office, commercial and institutional and building which faces an approved public street provided that the sign area does not exceed five (5) percent of the building facade area as defined in Section 1602 on which it is mounted.

9. For business, office, commercial and industrial uses: One (1) free-standing sign provided that the sign area does not exceed ten (10) percent of the builing facade area as defined in Section 1602, which it adjoins, or a maximum sign area of one hundred (100) square feet. No shopping center, office complex, or other business or industrial development or property shall have more than one (1) free-standing sign.

10. For shopping centers or strip stores: One (1) under-canopy sign for each business use provided that the dimensions of the sign shall not exceed non (1) foot in weight or four (4) feet in length.

11. For movie theaters, theaters, and sports areas: those signs permitted by paragraphs 8 and 9 above, plus one (1) changeable copy sign with a maximum sign area of one hundred (100) square feet.

12. Temporary signs announcing or advertising any political, educational, charitable, civic, professional, religious, or like campaign or event for a consecutive period not to exceed sixty (60) days in any calendar year, providing they do not exceed fifty (50) square feet in size.

13. Signs identifying a residential area or apartment complex provided that not more than one (1) sign shall be located at each principal entrance to the project, not more than three (3) signs permitted for any one (1) project and that the sign contain only the name of the development and a logogram or symbol and that its size not exceed forty (40) square feet in size area.

SECTION 1605. PROHIBITED SIGNS. Although it should be understood that any sign not complying with the provisions of this Article is prohibited, the following types of signs are specifically prohibited.:

1. Flashing, moving, or apparent moving signs except the changeable copy signs permitted by Section 1604. and time and temperature signs.

2. Signs with any lighting or control mechanism which may cause radio or television interference.

3. Any series of two (2) or more signs or sign units placed in a line along a roadway or in similar fashion all carrying a single message part of which is contained or each sign.

4. No signs shall be erected, located, affixed or painted on trees, rocks, curbs, walks, or utility poles. (Amended October 3, 1991)

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No. 96-559

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

INTERVINE OUTDOOR ADVERTISING, INC.,
Petitioner,

vs.

CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT & CITY OF GLOUCESTER CITY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

OPPOSITION BRIEF OF RESPONDENT, CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT, TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1) Where the state court decisions rest upon clearly stated adequate and independent state grounds that the Gloucester City Zoning Board properly denied a billboard company's application for use and bulk variances under N.J.S.A. 40:55D-70(c)(d), and was not arbitrary, capricious, or unreasonable, and that the City's Master Plan and Zoning Ordinance were properly reviewed and readopted under N.J.S.A. 40:55D-89-89.1, whether this Court has jurisdiction to review the New Jersey courts' resolution of constitutional issues.

2) Whether this Court should exercise its discretion to review a petition for a writ of certiorari when the New Jersey courts properly upheld the constitutionality of the Gloucester City Zoning Ordinance insofar as it regulates commercial speech, thereby creating no conflict with any federal or state court decisions, such that a billboard company's application for use and bulk variances to erect billboards, being in derogation of the entire zoning scheme, was properly denied.

3) Does a business that derives income by renting space on its billboards have standing to claim a noncommercial speech violation, and if so, whether the denial of its use and bulk variances to erect billboards, still being in

derogation of the entire zoning scheme, was proper, when the New Jersey court unequivocally held that only a time restriction contained in the noncommercial sign provisions of Section 1604, subsection 12 of the Gloucester City Zoning Ordinance would be severed as unconstitutional, and held that the remainder of both noncommercial and commercial sign regulations survive.

4) In the event that this Court determines that the sign provisions of the Gloucester City Zoning Ordinance are unconstitutional as applied, is it fair to allow a billboard company to erect its billboards without Gloucester City being afforded a reasonable time to amend its Ordinance, when the billboards are still in violation of the entire zoning scheme.

CITATIONS OF THE CASE BELOW

The Supreme Court of New Jersey, which is the state's highest court, denied Intervine's Petition for Certification and dismissed the appeal by Order dated July 10, 1996 (C-1232, September Term 1995, 42-339), found at page A-1 of Petitioner's Appendix.

The Superior Court of New Jersey, Appellate Divison, issued its written Opinion and Order on May 2, 1996 (A-5193-94T3) which has been published and reported at 290 N.J.Super. 78 (App.Div. 1996); the Opinion is reproduced beginning at page A-2 of Petitioner's Appendix.

The Appellate Division affirmed the April 14, 1995 trial court Judgment of the New Jersey Superior Court, Law Division, (Docket No. L-013091-92), which Judgment and written Opinion are submitted under separate cover entitled "Lodging".

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction because the state court decisions below rest upon clearly stated adequate and independent state grounds.

STATUTORY PROVISIONS INVOLVED

1. Gloucester City Zoning Ordinance, ARTICLE XVI, SIGNS, SECTIONS 1601-1605, found beginning at page A-11 of Petitioner's Appendix.

2. Gloucester City Zoning Ordinance, ARTICLE IV, GENERAL PROVISIONS, SECTION 412.00, Shoreline Overlay District, pages 2-3 herein.

3. Gloucester City Zoning Ordinance, ARTICLE IV, SECTION 415.01, Sign Standards in shoreline district, page 3 herein.

4. Gloucester City Zoning Ordinance, ARTICLE XXV, SECTION 2501, severance clause, pages 8-9 herein.

5. N.J.S.A. 40:55D-70(c)(d)

6. N.J.S.A. 40:55D-89-89.1

7. Gloucester City Master Plan Goal, page 4 herein.

8. Gloucester City Master Plan Objective F and Means 4 of Objective F, page 4 herein.

9. Gloucester City Master Plan, Objectives B, C, D, G and J, page 29 herein.

10. Gloucester City Master Plan WATERFRONT REVITALIZATION section, page 4 herein.

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COUNTERSTATEMENT OF THE CASE

Intervine's complete mischaracterization and glaring omission of salient facts as well as the findings of the New Jersey courts in this case is outrageous. It is but a continuation of a red hearing strategy that grows with each of its appeals and is designed to distort and obfuscate the issues because Intervine's position is not legally supportable. None of the three New Jersey courts that reviewed this appeal were impressed with Intervine's strategy, and this Court should not be, either.

In a sneaky attempt to circumvent the validly enacted, well-organized zoning scheme in Gloucester City as set forth in its Master Plan, Zoning Ordinance, and Regulations because the site of the proposed billboards is in complete derogation thereof, Intervine grossly distorts to this Court the character of Gloucester City in general, as well as the location and impact of its proposed billboards in particular, even arguing for the first time here that its three, towering billboards, measuring a total of 2880 square feet, each externally lit at the bottom, **within** and over the City, "would only be viewed by bridge traffic," which Intervine well-knows is completely untrue. App.Div. Opinion, Intervine's Appendix, hereinafter "IA", at A-4; Trial Ct. Op., pp.2-4 (See "Lodging" submitted under separate cover); <u>infra</u> at p.5.

Moreover, the fact that there are billboards on the Philadelphia side of the bridge is completely irrelevant to the case at bar since Philadelphia, the fourth largest city in the country, is not only

entirely different in character, size, and population from Gloucester City, a small, residential town of approximately 13,000 population, but it is grossly misleading since the proposed billboards herein are in total derogation of the Gloucester City Master Plan, Zoning Ordinance and Regulations as held by the New Jersey courts in their affirmance of the Zoning Board's denial of a variance under N.J.S.A. 40:55D-70. IA-3-5; Trial Ct.Op., 2-11 (See Lodging).

As the trial court found, based upon extensive hearings before the Zoning Board (herein after "Board") on October 8 and November 12, 1992 (approximately 200 pages, transcribed), the

> "primarily residential city with a substantial portion being welfare dependent...is trying to recapture its historical significance and is in the process of developing the...area which is one of the entry ways to the city and is very close to the area in dispute." Trial Ct.Op.p.4; See Lodging.

Ignored by Intervine in all of its Briefs is the fact that the site of the billboards, as the New Jersey courts found, IA-4, is also located in the Shoreline Overlay District, which, pursuant to the Zoning Ordinance, ARTICLE IV, GENERAL PROVISIONS, SECTION 412.00, "shall include all lands within five hundred feet of all Delaware River shorelines of the City." It further provides:

"It is the purpose of this section to (1) protect the ecosystems of the shoreline areas, (2) encourage water-dependent uses, (3) provide for maximum public use and enjoyment of the shorelines of the City, and (4) preserve, enhance, and increase views of the water and access to the water."

Thus, not only are billboards clearly incompatible with the purpose of the Shoreline Overlay zoning district, but they are **prohibited** under the sign standards applicable to all signs in the shoreline district at ARTICLE IV, SECTION 415.01, which in addition to the sign regulations contained in Article XVI (IA-11-17), require that

" * * * *

3. Pole signs shall be permitted only on piers or floats which lack buildings for wall-mounted signs and only to provide visibility from a navigational fairway for water-dependent or water-related business establishments.

4. Ground mounted signs are permitted when not located in water view corridors or in an area which impairs visual access to water view corridors."

The Master Plan was passed in 1986 and the New Jersey courts held that it, along with the Zoning Ordinance and

Regulations, were validly reviewed, reexamined and readopted by the City pursuant to N.J.S.A. 40:55D-89-89.1, and thus, were in effect at the time of Intervine's billboard application. IA5-6. The stated Master Plan goal, first drafted in 1984, is **"shift image of Gloucester City from industrial town to desirable residential community."** Several stated objectives to reach that goal include "F. **Clean up and beautify entrances to the City,"** one being the Walt Whitman Bridge to which Intervine refers; also, **Means 4 of objective F is "Prohibit new billboards and attempt to retire old ones."** (Emphasis added). Not one shred of evidence has ever been submitted that these goals or objectives have ever changed to this day, as the New Jersey courts found. IA-4.

Further evidence contradicting Intervine's misleading assertions that the billboard situs is "fully urban and industrialized" is contained in the Plan's "WATERFRONT REVITALIZATION" section:

> "The waterfront represents a significant natural and economic resource for the City of Gloucester for recreational boating, pedestrian promenades and potential sites for water-front restaurants, housing and offices. The City has designated the waterfront south of Monmouth Street to the Big Timber Creek as an area for the development of the aforementioned uses."

Intervine applied for use and bulk variances under N.J.S.A. 40:55-70(d) and (c), respectively, seeking relief from ARTICLE XVI, SIGNS, SECTIONS 1603.2, 1603.5, 1603.6, and 1603.12, of the Zoning Ordinance. (See IA-13-14 and Trial Ct.Op. at 8). At the extensive hearings held before the Board on October 8 and November 12, 1992, during which Intervine, as it well knows, was represented by counsel, several residents vociferously expressed their objections and heart-felt dismay over their legitimate traffic safety and aesthetic concerns **since they live at and near the proposed site,** and thus would obviously "view" these billboards along with most of the City residents every day of their lives, contrary to Intervine's totally false assertions that only bridge traffic will "view" the billboards. See, e.g., resident who lives 30 feet from site ("Lodging," pp.23-24); resident who lives near site ("Lodging," pp.25-27); resident who testifies billboards would be in front of his, as well as "all our homes" ("Lodging," p.28); and resident arguing with Intervine witness that the billboards would be across the street from residences ("Lodging," p.29). Also see Trial Ct. Op., p.3.

Thus, the Board testimony further illustrates why billboards are incompatible with this zoning district, and why Intervine's relief should not be granted, as the New Jersey courts' well-reasoned opinions found.

In upholding the Board's denial of Intervine's variance application based upon the extensive Board hearings, the New

Jersey courts held the denial was substantially supported by the evidence and thus, was not arbitrary, capricious, or unreasonable, being in complete derogation of the City's validly enacted Master Plan, Zoning Ordinance and Regulations. IA-5-6; Trial Ct.Op., pp. 3-11.

The trial court was reluctant, citing the doctrine of strict necessity, to analyze Intervine's constitutional argument. Op., pp.11-14. Out of "prudence," it did so after an exhaustive "Bell hearing" held on February 22, 1994 (approximately 101 pages, transcribed) pursuant to Bell v. Stafford Township, 110 N.J. 384 (1988), grossly misstated and misapplied by Intervine. The Board, but not Intervine, presented witnesses who testified about the factual basis for why billboards were prohibited under the Zoning Ordinance when first passed in 1987, being contrary, for aesthetic reasons, to the entire zoning scheme; the courts below also finding that traffic safety was another legitimate, substantial governmental interest. Trial Ct. Op.,15-16; IA-7. Even **absent** a specifically stated objective, Bell makes clear that "several possible interests can be **hypothesized** as objectives of the Ordinance." Bell, supra, at 396 (emphasis added). Moreover, the Delaware River Port Authority, the owner and operator of the Bridge (Trial Ct. Op.,p.3) specifically objected to the billboards based upon traffic safety concerns. Trial Ct.Op., pp.15-16.

As the Board argued below at the "Bell" hearing, the lower courts obviously agreeing, the Zoning Ordinance does not restrict any other modes of communication except huge billboards; other modes of communication are left open for **all** speech, and are **not** regulated by the Ordinance, including smaller signs that can be placed inside windows, newspapers, direct mailings, radio and television advertising, as well as 13 categories of larger permitted signs, including those containing noncommercial speech at Section 1604.12 (IA-16). Thus, each one of Intervine's counsel's esoteric examples of what possibly could ever be put on any sign in the universe, as argued in the Petition as not being allowed under the Ordinance, would in fact, be allowed.

Finding that the credible, extensive Bell testimony elicited by those who drafted the Master Plan, Zoning Ordinance and Regulations demonstrated legitimate City objectives (aesthetics, preservation of property values, and traffic safety) genuinely served by the billboard ban, the trial court, in an extensive, well-reasoned Opinion that correctly applied the standards as set forth in Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d. 341 (1980) and Metromedia v. San Diego, 453 U.S. 490 (1981) and their progency, upheld the constitutionality of the Ordinance regarding the regulation of commercial speech with respect to the sign regulations, finding that it was "clearly shown that a sufficiently substantial governmental interest is furthered by the scope of the ordinance;" Trial Ct. Op. at

19, "not because argued by Intervine, but inferentially determined by the trial court" that the Ordinance's limitations on size, and of advertising subject matter relating to the use of the business located on the property, did not violate Intervine's commercial speech rights. Op., pp.11-21. Since Intervine, a commercial speech applicant, lacks standing to raise noncommercial speech questions, the trial court properly declined to determine them, but held that even such an attack was without merit since Section 1604.12 (IA-16)

> "cover(s) such a broad area of possible human discourse, that a conclusion that it infringes upon applicant's First Amendment rights is not reasonably supportable." Op. at 20-21.

The Appellate Division affirmed the judgment in Respondents' favor, and also affirmed the trial court's ruling that Intervine's commercial speech rights are not violated by the Ordinance. IA-6. However, it found unconstitutional one part of the sign regulations limiting noncommercial speech to a temporary basis, which appears at Section 1604.12 of the Ordinance (IA-16). IA-8-9.

Observing the severance clause of the Ordinance, ARTICLE XXV, SECTION 2501, that provides:

> "Should any section or provision of this Ordinance for any reason be declared invalid by the Court, such decision shall not

> affect the validity of this Ordinance as a whole or any other part thereof,"

the Appellate Division held that severing the time restrictions contained in the noncommercial sign provisions of Section 1604.12 "will not preclude noncommercial signs and will not truncate the entirety of the sign provisions into incomprehensibility." IA-10. The Appellate Division made crystal clear, through painstaking analysis, its ruling that only the time restrictions contained in Section 1604.12 were to be severed, and hence unenforceable, as an unconstitutional restriction on non-commercial speech, IA-3-7-8-9-10, finding only that the time restriction was content-specific since there is no similar time restriction placed upon commercial speech anywhere in the Ordinance. Id. Intervine's transparent attempts to attach confusion as to what was severed is appalling.

Moreover, by affirming the judgment in Respondent's favor, the Appellate Division obviously disregarded Intervine's specious argument that its noncommercial speech rights have been violated. No court has ever "held the entire Section 1604.12 content specific" contrary to Intervine's misleading assertions at pp. 3-4 of its petition, the trial court finding that "off site commercial signs may be prohibited while on site commercial signs are permitted," the distinction being an "appropriate one" under Metromedia v. San Diego, 453 U.S. 490 (1981) and its progency. Trial Ct. Op., pp.18-19.

In its continuing appellate effort to confuse commercial and noncommercial speech issues by completely distorting the Record, Intervine pretends that it is the purveyor of public service announcements, despite the fact that it profits, no matter what the message.

Contrary to Intervine's misleading assertions at page three and elsewhere, the lower courts **never** "supported" or "accepted" Intervine's contention that its signs would "clearly display non-commercial speech." The trial court, in fact, completely **disbelieved** Intervine's sudden change of assertion, based upon its honestly stated motive way back at the October 8, 1992 Zoning Board hearing, wherein it admitted its true profit-making motive:

> ". . . we're here to make a profit, but we realize to be profitable, we have to coexist with our neighbors, and in that sense we'd like the people here to know that we are sincere in our application. We're not here to take advantage of anyone. We're here for a profit motive, but that's part of the American way. Everybody here similarly has a job and they do it because they want to make a profit, but we're here also just to acknowledge the fact that we need-- we need relief from the Board, and we also really need relief from the citizens here to

> construct these signs..." (Trial Ct.Op. at 5-7; emphasis in original).

On appeal, and still absent one shred of credible evidence, Intervine argued again that it would seek to "display" non-commercial messages; the Appellate Division merely restates what Intervine **"proposed"** at IA-4, in fact **rejecting** any alleged noncommercial speech violation as applied to Intervine because it affirmed the judgment in Respondents' favor.

Further, as the trial court held with respect to Intervine's non-commercial speech question,

> "the permissible limitation in size is so far removed from what the applicant desires, it can not be held that Intervine's interest with regard to this specific question is even remotely significant, and the applicant has not presented such a position. Also, there is not a shred of evidence that on-site signs covered by the ordinance have ever been used for noncommercial messages nor are such signs at issue in this case. Further, there is no evidence in this case that remotely suggests that the City, by creating these few exceptions, is attempting to influence public opinion or to limit public debate on particular issues. Most assuredly, such conclusion can

not be derived from the face of the ordinance." Op. at p.20.

The Record is replete with evidence, as found by the courts below, of municipal concern about aesthetics, the preservation of property values, and traffic safety, which are "substantial governmental goals" and proper objectives of regulation through zoning, Trial Ct. Op., pp.12-17, IA-7, and the billboard restriction "reaches no further than necessary to accomplish the given objectives" under Metromedia v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) and their progency. Id.

ARGUMENT WHY THE WRIT SHOULD BE DENIED

There are no compelling reasons in this case that would justify this Court's exercise of its discretion to review Intervine's petition for a writ of certiorari. U.S. Sup.Ct.Rule 10, 28 U.S.C.A. The Court should not be persuaded by Intervine's red herring smokescreen strategy contained in its Argument at pp.4-11 of its Petition, which merely parrots the intentionally misleading and misapplied facts and law in this case already presented in its Statement of the Case at pp.1-4; supra at pp.1-12, as well as its knowing mischaracterization of Gloucester City in general, and of the site and impact in particular of its proposed billboards upon the people who live and work in Gloucester City. Id.

The final judgment of the New Jersey Superior Court Appellate Division, IA-2-10, upon which the New Jersey Supreme Court, the state's court of last resort, denied certiorari, IA-1, correctly applied well-settled provisions of federal law already enunciated by this Court, as well as by other federal and New Jersey courts, and does not conflict with any decisions of this Court, or of any other state or federal court. U.S. Sup.Ct.Rule 10, 28 U.S.C.A. Even when the asserted error consists of erroneous fact findings or the misapplication of a properly stated rule of law, a writ is rarely granted. Id. There is little doubt that the New Jersey courts "reached their ultimate conclusions in this case by applying traditional, well-understood principles which does not

transmute this case into one of general public importance. Mahony v. Danis, 95 N.J. 50,51-52 (1983). As it did below, Intervine "invitingly" misframes the issues in this case, and attempts to create confusion in the Appellate Division Opinion, where clearly, none exists. Cf Fox v. Woodbridge Township Board of Education v. Board of Review, 98 N.J. 513 (1985) (dismissing appeal because certification improvidently granted); IA-9,8.

Moreover where, as here, the judgment can rest upon adequate and independent state grounds, which are indicated clearly and expressly, the Supreme Court lacks jurisdiction to review the state court's resolution of federal law issues. Schor v. Florida, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d. 326, on remand 619 So.2d 285, certiorari denied 510 U.S. 1025, 114 S.Ct. 638, 126 L.Ed.2d 596, rehearing denied ___U.S.___, 114 S.Ct. 1142, 127 L.Ed.2d 452 (1992). Further, the Supreme Court is not free to substitute its own interpretation of state statutes for those of state courts. Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555, rehearing denied 501 U.S. 1277, 112 S.Ct. 28, 115 L.Ed.2d 1109 (1991) (Per Justice Souter with the Chief Justice and two Justices concurring and one Justice concurring in the result). The Supreme Court accords respectful consideration and great weight to views of a state's highest court, General Motors Corp. v. Romein, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d. 328 (1992). The proposition that a federal court cannot consider the merits of a federal claim where a state court judgment

rests on a state law ground that is both independent of the merits of the federal claim and serves as an adequate basis for that judgment applies to state court judgments on direct review before the Supreme Court. Turner v. Williams, 812 F. Supp. 1400, affirmed 35 F.3d 872, certiorari denied 115 S.Ct. 1359, 131 L.Ed 216 (E.D.Va. 1993). Further, the Supreme Court has no authority to review state determinations of purely state law, or review federal issues that can have no effect on the state court's judgment. See, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562,566, 97 S.Ct. 2849, 2852, 53 L.Ed.2d 965 (1977).

In the case at bar, the New Jersey Supreme Court, by denying certification, IA-1, has let stand the Judgment and Opinion of the Appellate Division, IA-2-10, which was

> "satisfied, based upon the thorough and well-reasoned letter opinion of Judge Theodore Z. Davis (the trial court) that the Board's denial of Petitioner's application for a use and bulk variance finds support in the evidence and was not arbitrary, capricious, or unreasonable. Booth v. Board of Adj. of Rockaway, 50 N.J. 302, 306 (1967)." IA-5; Trial Ct.Op., pp.3-11.

The lower courts correctly concluded that Petitioner's application for use and bulk variances

> "was a substantial departure from the signage requirements of the zoning ordinance, that the application could not be granted without substantial detriment to the public health, safety, and welfare of the City, and that the Petitioner had not shown any special reasons why the application should be granted in view of the detriments. See N.J.S.A. 40:55D-70d." IA-5.

Additionally, the New Jersey courts below correctly concluded that the City formally reexamined and readopted its Master Plan and Zoning Ordinance in compliance with N.J.S.A. 40:55D-89 and 89.1. IA-A-5-6, also citing Lionshead Woods Corp. v. Kaplan Bros., 243 N.J. Super. 678, 684-85 (Law Div. 1990).

The trial court determined that under the doctrine of "strict necessity" it is not the philosophy of our courts to reach and determine a constitutional issue unless absolutely imperative in the disposition of litigation, citing Donadio v. Cunningham, 58 N.J. 309, 325-26 (1971). Trial Ct.Op. at 11. However, despite the adequate and independent state grounds for upholding the Board's denial of Intervine's application for use and bulk variances, as well as holding that the City complied with New Jersey statutory and caselaw by properly reenacting and readopting Gloucester City's zoning scheme, as well as the court's interpretation of state statutes and New Jersey law, the trial court, out of

prudence only, addressed Intervine's constitutional question because it was made a

> "substantial portion of its argument, although not so in its complaint, and because the question of whether a commercial speech applicant has standing to raise noncommercial speech questions has evolved." Trial Ct.Op. at 13.

Since the Appellate Division judgment also rests upon the same adequate and independent state grounds that are also indicated clearly and expressly, IA-3-6, this Court lacks jurisdiction to review the New Jersey courts' resolution of federal law issues.

Even if this Court determines that it has jurisdiction to review the state courts' resolution of constitutional issues, the judgment should not be disturbed because both courts correctly applied well-settled federal principles already enunciated by this Court as well as by other federal and state courts, and the decisions below do not conflict with, nor do they misapply, any decisions of this, or of any other court, state or federal.

The Appellate Division correctly affirmed the trial court in upholding the constitutionality of the Zoning Ordinance insofar as it regulates commercial speech with respect to the sign regulations. IA-3-6; Trial Ct.Op. at pp. 14-20.

Singer Supermarkets, Inc. v. Hillsdale Board of Adjustment, 183 N.J. Super. 285 (App.Div. 1982), held that an ordinance, such as the one here, which simply limits advertising - commercial speech, is entitled to a lesser degree of protection than other forms of expression. Id. at 288. Analyzing the standards governing the regulation of commercial speech as set forth in Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the court held that the ordinance in Singer was constitutional. Id. at 288-290.

Here, as in Singer, the restrictions on commercial speech imposed by the Ordinance are likewise valid under the four-part analysis of Central Hudson.

First, it is assumed that the proposed billboards will concern lawful activity and not be misleading. Second, the Record is replete with municipal concern about aesthetics and traffic hazards, which are "substantial governmental goals. In this regard, it is firmly settled that traffic safety and aesthetics are the proper objectives of regulation by a municipality through zoning." Singer, supra, at 290: Metromedia Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); State v. Miller, 83 N.J. 402 (1980).

Moreover, it is constitutional for a state to ban signs and billboards as part of zoning laws designated to further aesthetics, preserve property values and promote traffic safety. See, e.g.,

Markham Advertising Co. v. State, 73 Wash.2d 405, 439 P.2d 248 (1968), appeal dismissed 393 U.S. 316, 92 S.Ct. 1126, 31 L.Ed.2d 512, reh. den., 393 U.S. 1112, 89 S.Ct. 854, 21 L.Ed.2d 813 (1969) (cited with approval in Young v. American Mini Theaters, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, reh. den., 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155 (1976)).

Thirdly, the regulation directly advances the governmental interest asserted, pursuant to the Master Plan Goal to **"shift image of Gloucester City from industrial town to desirable residential community"** pursuant to the stated objectives including "F. **Clean up and beautify entrances to the City,**" and pursuant to the stated "Means 4. of Objective F., **"Prohibit new billboards and attempt to retire old ones"**. Supra, p.5.

Moreover, Intervine seeks to erect its billboards at the waterfront area, which is right at one entrance to the City, accessible by the Walt Whitman Bridge, an area clearly unsuitable for billboards under the Master Plan, "WATERFRONT REVITALIZATION," supra at p.4, and **prohibited** by the content-neutral sign restrictions applicable to the Shoreline Overlay District, in which the billboards would lie. supra at pp.2-3.

Fourthly, as in Singer, the Ordinance is no more extensive than necessary to serve the City's goals, and also meets the standards enunciated by this Court in subsequent cases. Infra, pp.25-26 herein. In fact, as in Metromedia, supra, the City

could have even gone further than it did because the Ordinance still permits all speech and all modes of communication except huge billboards. Supra at p.7.

As in Singer Supermarkets, Inc. v. Hillsdale Board of Adjustment 183 N.J.Super. 285 (App.Div. 1982), the Ordinance simply limits advertising, commercial speech. Moreover, the City has appropriately distinguished between on-site advertising and off-site advertising, which is constitutionally permissible under Metromedia, in concluding that a "commercial enterprise, as well as the public, has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere."(Trial Court Op. at 11).

As the court stated in State v. Miller, 83 N.J. 402,415 (1980), a municipality may distinguish between commercial and political speech in imposing restrictions on signs, citing Lehman v. Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974). Moreover,

> "the content of a particular advertisement may determine the extent of its protection *** A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere *** The measure of

> constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication."

Miller, supra, at 415-416, quoting Young v. American Mini Theaters, at 427 U.S. 68-69, 96 S.Ct. 2440, 49 L.Ed.2d at 325 (footnotes omitted).

The Record below clearly shows that this primarily residential City has been revitalizing itself and recapturing its historical significance, as indicated through testimony, as evidenced in its Master Plan of 1986, readopted in 1991, and through its Zoning Ordinance of 1987, which conformed to the Master Plan. The older portions of our major urban areas "should not be prevented from taking steps to correct, as best they may, mistakes of their predecessors. Metromedia, supra, 69 L.Ed.2d at 854 (Justice Rehnquist, dissenting).

As State v. Miller, 83 N.J. 402,410 (1980), quoting Metromedia, Inc. v. San Diego, at 592 P.2d 728,748, 154 Cal.Rptr. 212,232 (1979) so aptly stated:

> "(T)o hold that a city cannot prohibit off-site commercial billboards for the purpose of protecting and preserving the beauty of the environment is to succumb to a bleak materialism."

Intervine's hysterical concerns about a "regime" of censorship in Gloucester City was specifically **rejected** by the

trial court, supra at pp.11-12, and finds no support in the Record, Master Plan, Ordinance and Regulations in Gloucester City, nor caselaw. The Gloucester City Sign Ordinance does not create a "total ban" on all off-premises commercial and noncommercial speech, see, e.g., Section 1604.12, and supra at p.7, and is not impermissibly content specific since off-site noncommercial speech is allowed. Id. Intervine's less than sincere concern about what the people who live and work in Gloucester City may say or read on signs there is completely misplaced and also incorrect under the Zoning Ordinance. Id. Intervine only wants its own customers who will **not** be living there to be able to advertise on huge billboards for vast sums of rent. All over Gloucester City, businesses, especially liquor stores, have numerous signs inside their windows which are not prohibited under the Ordinance because they are not signs defined to be regulated. Id. Therefore, Intervine need not worry about Gloucester City's architects, accountants, or roofers, Pet. at 8, and "Peace in Gulf" permitted in City of Ladue v. Gilleo, 512 U.S. 43 (1944) (Intervine's Pet.at p.5) is also clearly allowed under Section 1604.12.

Intervine cynically argues throughout its Petition that the term "noncommercial speech" should apply so as to permit "commercial speech" to be protected in the same manner as noncommercial speech. However, it has no basis to argue that it is the defender of noncommercial speech, and it is untrue that it intends to be its purveyor, there being not one shred of evidence in the Record, only Intervine's

counsel's bald assertions. The fact that the Appellate Division momentarily discussed noncommercial speech issues during oral argument does not translate into an acceptance of Intervine's role as the protector of public service announcements in Gloucester City; Intervine could care less about the residents there. As the trial court so aptly stated, "it is not reasonably supportable" to conclude that the Ordinance infringes upon Intervine's First Amendment rights. Op. at p.20. Intervine gets paid vast sums of rent, no matter what the message. It is hard to imagine that any noncommercial speech not involving commerce would ever be advertised on these billboards.

The Appellate Division correctly affirmed the trial court in upholding the constitutionality of the Zoning Ordinance insofar as it regulates commercial speech with respect to the sign regulations. IA-3-6. Assuming, arguendo, that Intervine even has standing to argue the constitutionality of the sign regulations applicable to noncommercial speech, and further assuming, arguendo, that this Court agrees with the Appellate Division that the temporal restriction contained in the noncommercial sign regulations is unconstitutional, the Appellate Division correctly held that the temporal restriction could be severed from the noncommercial sign regulations under the severance clause of the Ordinance, the remainder of the provisions surviving, including those that regulate commercial speech with respect to signs. IA-9,8,3,7. There is no basis in logic for Intervine's

contention that the Appellate Division Opinion can in any way be interpreted to require deletion of Section 1604.12 in its entirety. The commercial sign provisions can stand in the absence of the time restrictions contained in the noncommercial sign provisions of Section 1604.12, IA-10, and the billboards not only are prohibited under ARTICLE XVI, IA-11-17, but are **still** prohibited under ARTICLE IV, Section 415.01, since the situs would also be in the Shoreline Overlay District. Supra at pp.2-3.

Further, "there is not a shred of evidence that on-site signs covered by the ordinance have ever been used for noncommercial messages, nor are such signs at issue in this case." Supra, p.11. By stating the issues incorrectly, Intervine hopes to "cast doubt upon the integrity of the decisions below. But, in reality, it remains a factual dispute hardly requiring Supreme Court review. Fox v. Woodridge, supra, 98 N.J. 513,515.

Since the state's highest court has denied certification and the Appellate Division struck only the time limitations pertaining to noncommercial speech, letting stand the trial court's broad interpretation of the noncommercial sign speech provisions contained in Section 1604.12 (IA-16), Intervine may now rest easily knowing that anyone desiring to advertise noncommercial speech in Gloucester City may do so without any time constraints, the regulation now being even **broader** than it once was before Intervine mounted its noncommercial speech attack. Supra, p.7. Thus, Intervine's reliance

upon Rappa v. State of Delaware, 18 F.3d 1043 (3rd Cir. 1994) and City of Ladue v. Gilleo, 512 U.S.43 (1994) at p.9 is totally misplaced since **less** is being restricted, not more!

Intervine's reliance upon 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996) and City of Cincinatti v. Discovery Network, 502 U.S. 410 (1993) at pp.8-9 of its petition is misplaced since the Record is replete with evidence, as found by the New Jersey courts, that the Master Plan, Zoning Ordinance, and Regulations do advance a substantial interest in aesthetics, property values and traffic safety, reaching no further than necessary as established by the Record to a material degree, and also establish a "reasonable fit" between its legitimate interest in safety and aesthetics and its choice of means to serve those interests. See Trial Ct.Op. at 15-20 and IA-4,5,7, particularly since the stated objectives of the zoning scheme include "prohibit new billboards and retire old ones," and "clean-up and beautify the entrances to the City," one entrance being the very Walt Whitman Bridge of Intervine's petition!

It is untrue, contrary to Intervine's complaint peppered throughout its Petition that "no less restrictive alternatives were considered," pet. at. 3; See Trial Ct.Op. at pp.8-9; supra at pp.6-7, extensive testimony at Bell hearings; but under City of Cincinatti v. Discovery Network, supra, restrictions on commercial speech are not to be judged on whether they represent the "least-restrictive-

means" of achieving the governmental objective, nor on the basis of whether such restrictions have a "rational basis"; the regulation need not be the absolutely least severe that could achieve the desired end.

As the trial court so aptly stated:

> "a close inspection of the record below indicates that the judgments of the Board and the City are not public rationalizations of an impermissible purpose, but a resolve to revitalize their community and recapture its historical significance...the status of the law is not such that a community must be like historical Williamsburg in order to sustain a prohibition against billboards." Op. at p. 18.

CONCLUSION/RELIEF REQUESTED

Intervine improperly argues that it should be granted a variance by this Court, completely ignoring the fact that the proposed billboards still violate the intent and purpose of the validly enacted Master Plan, Zoning Ordinance, and Regulations, all of which have been upheld by the New Jersey courts with the exception of the time limitation on non-commercial speech contained in Section 1604.12 , which time restriction has been severed, and rendered unenforceable. IA-7-8-9.

The unconstitutionality of even all of the Sections of the Ordinance about which Intervine complains still does not affect the variance denial.

Article IV, SECTION 415.01, sign standards in Shoreline Overlay District, which is where Intervine wants to put its billboards, contain the content neutral requirement that

> "ground mounted signs are permitted when not located in waterview corridors or in any area which impairs visual access to waterview corridors."

This provision alone supports the Zoning Board's denial of a variance supported by the credible evidence of Record. Supra, pp.2-3.

Intervine thus is still not permitted to erect its billboards and the remaining Articles of the Gloucester City Zoning

Ordinance (spanning 94 pages) continue to represent valid, enforceable regulations passing constitutional muster.

Moreover, the variance still fails under Article 16, Section 1603, relating to size, placement, and length of time of illumination. Trial Ct. Op., p.8.

As held by the courts in this state, the Record below is replete with credible evidence that the Zoning Board properly denied Intervine's variance application and was not arbitrary, capricious, or unreasonable, the Board concluding, upon credible evidence, that the application was a substantial departure from the sign requirements of the Ordinance, that there would be a substantial detriment to the public health, safety, and welfare of the City if the variances were granted, and that Intervine failed to show any special reasons why they should be granted in view of the detriments under N.J.S.A. 40:55D-70d. IA-5; Trial Ct. Op., pp. 3-11. On this basis alone, this Court lacks jurisdiction to consider the lower courts' application of constitutional issues. Supra, pp.5-6 and 14-16.

Moreover, there are no compelling reasons why this Court should exercise its discretion to review Intervine's petition for a writ of certiorari, its commercial speech rights not being violated, as properly determined by the courts below, supra, pp.13-26, as well as the fact that Intervine not only lacks standing to launch a noncommercial speech attack, but even these alleged interests are not

violated by the Ordinance, as the lower courts properly held. Id.

Intervine's reliance upon Bell v. Stafford Township, 110 N.J. 384 at p.10 of its Petition is (not surprisingly) misplaced. In Bell, the town completely failed to demonstrate any factual basis for the total municipal-wide ban upon billboards, unlike the situation here, where the Record is replete with evidence that billboards were banned for aesthetic and traffic safety reasons, substantial, settled governmental goals under established caselaw. Trial Ct. Op., pp. 16-18; supra, at pp.6-7.

The fact that Intervine's proposed billboards still violate the intent and purpose of the validly reexamined and readopted Master Plan is yet another basis upon which its variance application was properly denied.

There is not one shred of evidence that the Board intended to change its Master Plan Goal to "SHIFT IMAGE OF GLOUCESTER CITY FROM INDUSTRIAL TOWN TO DESIRABLE RESIDENTIAL COMMUNITY," nor to change its "Objectives" to reach that goal, which include "B. Demolish or rehabilitate "run-down buildings; C. Refurbish and beautify older homes and enforce codes; D. Preserve and accentuate historic structures; **F. Clean up and beautify entrances to City;** G. Screen and buffer unsightly facilities; and J. Provide areas for new residential development" (emphasis added).

Most telling is the fact that there is not one scintilla of evidence that the City intended to change its Objective F. with respect to cleaning up and beautifying entrances to the City which is where Intervine wants its billboards, by "MEANS 4. **Prohibit new billboards and attempt to retire old ones.**" There was also ample testimony at the Bell hearings held below (pursuant to Bell v. Stafford Township, 110 N.J. 384 (1988) criteria) proving the City's intent to continue to revitalize itself as a residential community, and, as the trial court found, "trying to recapture its historical significance." Op. at p.4; supra, pp.2-8.

Moreover, the 1987 Zoning Ordinance established the Shoreline Overlay District, which includes all lands within 500 feet of all Delaware River shorelines of the city, which is where Intervine wants its billboards. Clearly, the Ordinance's prohibition of signs which impair visual access to water view corridors found at ARTICLE IV, SECTION 415.01, supra at pp.2-3, is facially consistent with the Master Plan's means of prohibiting new billboards in order to clean-up and beautify city entrances.

Thus, it would be unfair if the Court did not afford Gloucester City an opportunity to cure any defect in its Ordinance which otherwise would permit Intervine's billboards, as in Exxon Company, USA v. Livingston Township in Essex County, 199 N.J.Super 470 (App.Div. 1985), where the township was permitted to

amend its ordinance to constitutionally achieve its objectives.

Intervine, whose only honestly stated objective way back at the Zoning Board hearings was to make lots of money, as the trial court held, Op.,p.5 supra, pp.10-11, and who could care less about the people who live and work in Gloucester City, should not be permitted to use the First Amendment to allege a noncommercial speech violation to obtain indirectly what it can not obtain directly. All of its noncommercial speech proclamations are after-the-fact attempts in its Briefs to cloud the issues in this case, and if the Gloucester City Ordinance had permitted billboards conveying only commercial messages, Intervine never would have complained.

For all of the foregoing reasons, this Court should deny Intervine's Petition for a Writ of Certiorari.

Respectfully submitted,

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Of the Brief

November 7, 1996

Supreme Court, U.S.
F I L E D
DEC 9 1996
CLERK

(3)

DOCKET NO. 96-559

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

INTERVINE OUTDOOR ADVERTISING, INC.
Petitioner
v.
CITY OF GLOUCESTER CITY
and
CITY ZONING BOARD OF ADJUSTMENT FOR THE CITY OF GLOUCESTER CITY
Respondents

BRIEF OF RESPONDENT CITY OF GLOUCESTER CITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Appeal from the Supreme Court of New Jersey

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46 pp

QUESTIONS PRESENTED

1) Whether the New Jersey legal standard for the severance of invalid provisions of an ordinance is both valid and constitutional, and permitted the lower court to sever the temporal restrictions of Section 1604.12 of Gloucester City's Sign Ordinance without declaring the entire ordinance unconstitutional.

2) Whether compelling reasons exist to grant Intervine's petition for a writ of certiorari in the instance wherein the lower courts followed, and did not contradict, established legal precedent including but not limited to this Courts ruling in Metromedia, Inc v. San Diego.

3) Whether Intervine's assertion that Gloucester City did not satisfy the standard set forth in Bell v. Stafford is inaccurate and ignores the clear weight of the testimonial evidence and legal rational set forth by the lower courts.

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CITATIONS OF THE CASE BELOW

The unreported New Jersey Supreme Court decision which denied Intervine's Petition for Certification is included at page A-1 of Petitioner's Appendix.

The Superior Court of New Jersey, Appellate Division opinion is reported at 290 N.J. Super. 78 (App. Div. 1996) and reproduced in full beginning at page A-2 of Petitioner's Appendix.

The unreported Superior Court of New Jersey, Law Division opinion is included in the City of Gloucester City's Appendix which begins at page A-18.

JURISDICTIONAL STATEMENT

Final judgments rendered by the highest court of a State may be reviewed by this Court by writ of certiorari pursuant to 28 U.S.C. § 1257(a). Upon examination of Intervine's' Petition and Respondents' briefs in opposition to Intervine's Petition, jurisdiction should be denied by this Honorable Court.

STATUTORY PROVISIONS INVOLVED

1) Gloucester City Zoning Ordinance, Article IV, Section 415.01, sign standards in Shoreline Overlay District (set forth herein at page 9).
2) Gloucester City Zoning Ordinance, Article XVI, Section 1601-1605, incorporated herein in full beginning at A-11 of Petitioner's Appendix.
3) Gloucester City Zoning Ordinance, Article XXV, Section 2501, (set forth herein at page 7).

STATEMENT OF THE CASE

Intervine has filed a Petition for a Writ of Certiorari to this Court seeking (1) to have a municipal Zoning Ordinance declared unconstitutional on the grounds it impermissibly censors commercial and noncommercial speech; and (2) a finding that the New Jersey Supreme Court committed reversible error by concluding a severance clause incorporated in the Zoning Ordinance permitted the court to eliminate a single unconstitutional temporal restriction within one sub-section of the ordinance without declaring the entire ordinance invalid.

The City of Gloucester City opposes Intervine's Petition on the basis that the lower court decisions are grounded in established legal precedent and do not conflict with existing Federal or other New Jersey case law.

PROCEDURAL HISTORY

In 1992, Petitioner Intervine Outdoor Advertising, Inc. ("Intervine") applied to the Gloucester City Zoning Board of Adjustment ("Board") for a use variance pursuant to N.J.S.A. 40:55D-70(d) and bulk variances pursuant to N.J.S.A. 40:55D-70(c). Intervine sought to construct three 960 square foot billboards in Gloucester City's Shoreline Overlay District, a prohibited use in the district. Public hearings on Intervine's application were conducted by the Board on September 10, 1992 and October 8, 1992. The Board voted to deny Intervine's application at the October 8, 1992 hearing.

On December 23, 1992, Intervine filed a Complaint in lieu of Prerogative Writs in the Camden County Superior Court, Chancery Division challenging the Board's denial of its application and the constitutionality of Gloucester City's Sign Ordinance.

On February 7, 1994, the trial court conducted a formal hearing to consider the validity of the Gloucester City Sign Ordinance pursuant to the holding of Bell v. Stafford Twp., 110 N.J. 384, 591 A.2d 692 (1988). Gloucester City and the Board presented live testimony in support of the constitutionality of Gloucester City's Zoning Ordinance. The former Chairperson of the Gloucester City Planning Board and three former members of Gloucester City Council testified on behalf of Gloucester City and the Board. Intervine presented no live witnesses at the hearing.

On April 14, 1995, the trial court issued an Order and letter opinion dismissing Intervine's Complaint in lieu of Prerogative Writs. Intervine filed a Notice of Appeal with the Superior Court, Appellate Division on May 26, 1995. The Appellate Division rendered a unanimous opinion on May 2, 1996 affirming the Judgment of the Camden County Superior Court Chancery Division dismissing Intervine's Complaint in lieu of Prerogative Writs.

In upholding the denial of the zoning variance to Intervine, the Appellate Division held that one section of the City's ordinance was unconstitutional, specifically Section 1604.12. The Appellate Division held the temporal restrictions set forth in the section were unconstitutional as imposing a content-based regulation without a compelling state interest. The Appellate Division further held that since the Zoning Ordinance contained a severance clause, the offending

provision would be severed, maintaining the validity of the balance of the ordinance. The Appellate Division agreed with Intervine's constitutional challenge to the specific provision of the Zoning Ordinance and further held the remaining provisions of the Zoning Ordinance provided a legal basis for the Board's denial of a zoning variance.

On May 16, 1996, Intervine filed a Notice of Appeal along with a Petition for Certification with the Supreme Court of New Jersey. By Order dated July 11, 1996, the New Jersey Supreme Court denied Intervine's Petition for Certification.

On October 7, 1996, Intervine filed a Petition for Writ of Certiorari with this Court. Gloucester City Zoning Board filed opposition dated November 7, 1996.

COUNTER STATEMENT OF FACTS

Gloucester City is a residential community with its population consisting mainly of low and middle income families. The City, located across the Delaware River from South Philadelphia, is currently trying to recapture its historical significance and economic viability by developing its waterfront on the Delaware River, which includes the land adjacent to the Walt Whitman Bridge, at which Intervine seeks to construct billboards. Gloucester City officials and residents have consistently opposed the erection of billboards adjacent to the Walt Whitman Bridge for a variety of reasons, including the preservation of aesthetics in general, fear of obstruction of the City's view of the Delaware River corridor, and fear of detracting from the entrances to the City.

In 1983 the Gloucester City Planning Board hired Planning Research and Development Company to prepare a Master Plan for the City. N.J.S.A. 40:55D-28(b)(1) requires that a municipality's Master Plan include a statement of objectives, principles, assumptions, policies and standards upon which the constituent proposals for the physical, economic and social development of the municipality are based. Accordingly, the Gloucester City Master Plan included a "Goals and Objectives Element". Object F of the goals and objectives element of the Master Plan was to "Clean up and Beautify Entrances to the City." Means 4 to achieve this objective was to "prohibit new billboards and attempt to retire old ones." Based upon review and recommendation of the Gloucester City Planning Board, the Gloucester City Mayor and City Council readopted the Master Plan on April 15, 1991. The Master Plan readopted by Gloucester City in 1991 included the objective of beautifying entrances to the City through the means of prohibiting new billboards.

On April 2, 1987 Gloucester City Mayor and Council adopted the Gloucester City Zoning Ordinance. Prior to adoption of the Zoning Ordinance, the City Council considered the Master Plan which had been prepared under the supervision of the Planning Board. An objective of the city's Master Plan is to rezone the waterfront area from industrial to mixed use development and to clean up and beautify the entrances to the city by various techniques, which include prohibiting new billboards and attempting to retire old ones. (See Petitioner's Appendix at A-4). The Zoning Ordinance established the Shoreline Overlay District which includes all lands within 500 feet of all Delaware River Shorelines of the City. Gloucester City's Zoning Ordinance, Article IV, Section 415.01 which regulates sign standards in the Shoreline Overlay District provides that "Ground mounted signs are permitted when not

located in water view corridors or in an area which impairs visual access to water view corridors." This ordinance is consistent with the Master Plan means of prohibiting new billboards.

On September 10, 1992 and October 8, 1992 the Board heard testimony on the application of Intervine for use and bulk variances to construct three billboards adjacent to the Walt Whitman Bridge. Intervine is a company engaged in erecting and maintaining freestanding, outdoor advertising structures. (See Petitioner's Appendix at A-4). The proposed billboards were to be double-faced, steel , freestanding pole signs. Each sign would be externally lit at the bottom, measuring 16 feet by 60 feet, and would be located approximately 30 feet above the bridge roadway, approximately 90 feet above the ground, and approximately 30 feet from the bridge rights-of-way. (See Petitioner's Appendix at A-5). Intervine proposed to use the signs for both commercial and noncommercial advertisements.

The Board acknowledged expert testimony on behalf of Intervine in support of the safe construction of the billboards, the economic advantages of the erection of the billboards and the impact of the billboards on traffic safety. The Board also acknowledged substantial public testimony in opposition to the construction of the billboards as the erection of billboards would be detrimental to the City's visual environment and property values in addition to having a deleterious effect upon the development of the waterfront and surrounding historic residential areas. The Board concluded that Intervine's application was a substantial departure from the signage requirements of the Zoning Ordinance, that the application could not be granted without substantial detriment to the

public, health, safety and welfare of the City, and that Intervine had not shown special reasons why the application should be granted in spite of the detriment such construction would have to the community. (See Petitioner's Appendix at A-5).

LEGAL ARGUMENT

Review on a writ of certiorari is a matter of judicial discretion and should be granted only for compelling reasons. In considering granting of a writ, the Court will consider: (1) a state court decision which has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals; and (2) wherein a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court. U.S. Sup.Ct.Rule 10(b) and (c).

The final judgment of the Appellate Division, upon whose decision the New Jersey Supreme Court denied certification, is premised on well-established State and Federal authority. The Appellate Division's decision does not conflict with any other decision of a state court of last resort or of a United States Court of Appeals. Moreover, the lower court decisions reflect proper adherence to existing Federal caselaw including Metromedia, Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882 (1981), the case upon which the Petitioner largely bases its argument for granting a writ of certiorari.

I. THE SEVERANCE CLAUSE OF THE CITY'S ZONING ORDINANCE IS VALID AND CONSTITUTIONAL AND PERMITTED THE LOWER COURT TO SEVER THE TEMPORAL RESTRICTIONS OF SECTION 1604.12 OF THE ZONING ORDINANCE WITHOUT DECLARING THE ENTIRE ORDINANCE UNCONSTITUTIONAL

The Gloucester City Zoning Ordinance contains a "severance clause":

> "Should any section or provision of this Ordinance for any reason be declared invalid by the Courts, such decision shall not effect the validity of this Ordinance as a whole or any other part thereof." Gloucester City Zoning Ordinance, Article XXV, Section 2501.

New Jersey law, relied upon by the Appellate Division, interprets such clauses to create a rebuttable presumption that any part of the ordinance which is found to be invalid is severable. Manalapan Realty, L.P. v. Twp. Committee of Twp. of Manalapan, 272 N.J. Super. 1, 15, 639 A. 2d 318 (1994) citing Inganamort v. Borough of Fort Lee, 72 N.J. 412, 422, 371 A.2d 34 (1977); Helmsley v. Borough of Ft. Lee, 78 N.J. 200, 237, 394 A.2d 65 (1978).

Given the legal presumption of severability, New Jersey caselaw prescribes an analysis to validate the remaining portions of an ordinance. The validity of an ordinance from which a provision or provisions have been severed is contingent upon whether, on balance, the remainder of the

regulations are functionally self sufficient to contain the essentials of a complete enactment. Gardens v. City of Passaic 130 N.J.Super. 369, 380, 327 A.2d 250 (1974). If a part of an ordinance is adjudged invalid and the remainder can stand independently without conflict with the overall basic purpose of the governing body, New Jersey caselaw upholds the validity of the remaining ordinance should be allowed to do so by the Courts. Harry Grant Center Corp. v. Mayor and Council of Borough of Fort Lee, 235 N.J. Super. 491, 501, 563 A.2d 449 (1989).

Metromedia, Inc. v. San Diego recognizes a state court's ability and responsibility to determine the meaning and application of a severance clause. Metromedia, 490 U.S. at 521, Note 26. See Liggett Co. v. Lee, 288 U.S. 517, 541 (1933) as cited in Metromedia at 521, Note 26 ("The operation of this severability clause consequent on our decision is a matter of state law. While we have jurisdiction of the issue, we deem it appropriate that we should leave the determination of the question to the state court."). In its opinion, the Appellate Division completed the analysis required under State law and concluded "...the absence of the temporal restrictions contained in subsection 12 of Section 1604 will not preclude noncommercial signs and will not truncate the entirety of the sign provisions into incomprehensibility." (See Petitioner's Appendix at A-10).

Had the lower court invalidated the entirety of the signage section of the Zoning Ordinance (Section 1604), denial of a variance is still clearly supported by the remaining Articles of the Zoning Ordinance. Within Article IV, specifically Section 415.01, sign standards in Shoreline Overlay District contain the content neutral requirement that:

> "Ground mounted signs are permitted when not located in water view corridors or in an area which impairs visual access to water view corridors." Gloucester City Zoning Ordinance, Article IV, Section 415.01.

This provision provides legal basis within the remaining provisions of the Zoning Ordinance, independent of the protested Sign Ordinance provisions, for the Zoning Board's denial of Intervine's variance. The Zoning Board's denial of Appellant's variance request would continue to be supported by valid regulation which passes constitutional muster.

The severance of the offending provision of the Zoning Ordinance follows established principles of New Jersey law. There exists no conflicts between the legal principles followed and any Federal issues. Intervine's Petition should be denied.

A. The Decision of the Lower Court Upholding the Validity and Constitutionality of the Remainder of the City Zoning Ordinance is Consistent with Metromedia v. San Diego and Its Progeny

The Appellate Division examined the remaining provisions of the City Zoning Ordinance under the standards set forth by this Court in Metromedia and by the New Jersey Supreme Court in Bell and concluded the remaining Ordinance did not unconstitutionally infringe on protected interests. Review of the facts underlying Metromedia clearly demonstrates the differences between San Diego's total ban and Gloucester City's reasonable regulatory provisions. In Metromedia, the City Ordinance banned all signs advertising off-site commercial and most non-commercial advertising. Id. at 503.

The Gloucester City ordinance limits the size of signage regardless of content and permits various modes of communication for both commercial and noncommercial speech. (See Gloucester City's Zoning Ordinance, Article XVI, Sections 1604.7, 1604.8, 1604.9 and 1604.12 at A-15 and A-16).

In Metromedia, the underlying ordinance afforded a greater degree of protection to commercial speech than noncommercial speech. Metromedia, 490 U.S. at 513. Gloucester City's ordinance affords no greater protection for commercial speech. Unlike Metromedia, Gloucester City's ordinance does not provide for a broad exception for onsite commercial advertisements while limiting and effectively banning offsite noncommercial advertisements. Instead the ordinance is much broader than San Diego's ordinance declared unconstitutional in Metromedia as Section 1604.12 does not differentiate between or prohibit either onsite or offsite noncommercial advertisements.

The rational for declaring San Diego's ordinance unconstitutional was that "insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages." Id. The Gloucester City ordinance limits billboards, whether they contain commercial or noncommercial advertisements. (See Sections 1604.7, 1604.8, 1604.9 and 1604.12 at A-15 and A-16). Moreover, the noncommercial signs permitted in the remaining Section 1604.12 of Gloucester City's ordinance are much broader and wider in scope than those areas of noncommercial speech enumerated in San Diego's ordinance. Id. at 514-515. Because the range of choice for noncommercial speech is so much broader in the Gloucester City ordinance, Intervine's concerns and assertions that Gloucester City officials will become the

final "arbiters" and "speech censors" is both exaggerated and unfounded.

II. THE TRIAL COURT'S FACTUAL FINDINGS AND THE APPELLATE COURT'S LEGAL CONCLUSIONS FOLLOW THE STANDARD OF BELL v. STAFFORD

In Bell v. Stafford Twp., 110 N.J. 384, 541 A.2d. 692 (1988), the New Jersey Supreme Court set forth a standard for factual inquiry necessary to evaluate the constitutional validity of a City Zoning Ordinance under the legal principles enunciated in Metromedia, Inc. v. San Deigo, 453 U.S. 490, 101 S.Ct. 2882 (1981) and Central Hudson Gas & Electric v. Public Service Comm'n, 447 U.S. 557, 65 L.Ed.2d 341, 100 S.Ct. 2343 (1980) Id. at 397.

> The municipality must satisfactorily demonstrate a legitimate governmental interest to be served by the enactment and demonstrate a reasonable factual basis indicating that the regulation advances the governmental interest and is no more expansive than necessary in advancing that interest. Bell, supra. at 395.

In February 1994, the trial court heard testimony of Gloucester City officials regarding the City's interest in sign regulation and the manner by which the City's Ordinance advanced those interests. The trial court found the City met its burden under Bell and the Appellate Court upheld those factual findings.

The facts in this case are clearly distinguishable from those in Bell. In Bell, there was a blanket prohibition against all outdoor off-premises signs located in the Township. Id at 386. The Gloucester City zoning ordinance permits a wide variety of outdoor signs. In Bell, the Appellate Division noted that "the record is almost totally devoid of any evidence concerning what interests of Stafford are served by the ordinance and the extent to which the ordinance has advanced those interests." Id at 396. In this case, a Bell hearing was held and factual findings rendered by the trial court finding substantial interest in advancing aesthetic and reasonable regulation furthering that interest. The City's testimony of former local officials, the City's Master Plan and this evidence was found credible by the trial court.

Under New Jersey state law, a municipality's Master Plan is the instrument which controls local land use regulation. The Master Plan is to be prepared by the municipality's Planning Board. N.J.S.A. 40:55D-28(a). The governing body of a municipality is empowered to enact or amend its local Zoning Ordinance which regulates land use within the municipality. N.J.S.A. 40:55D-62. This statute requires that before a Zoning Ordinance may be adopted, the municipality must have a Master Plan prepared by the Planning Board. The Zoning Ordinance must be substantially consistent with the Master Plan. N.J.S.A. 40:55D-62(a). The Gloucester City Planning Board began preparation of the Master Plan sometime in 1983. The Gloucester City Master Plan was formally adopted in 1987.

The Gloucester City Zoning Ordinance, which implements the Master Plan, was approved on April 2, 1987. Gloucester City and the Zoning Board presented the Trial Court with testimony from the Planning Board Chairperson who served

from 1982 through 1990; a City Council member who began his term in January 1987; a City Council member who served from 1981 until the end of 1986; and another City Council member who served from 1984 through the end of 1986.

The lower court upheld the trial court's finding that Gloucester City "has met its burden and it has been clearly shown that a sufficiently substantial governmental interest is furthered by the scope of the ordinance." (See attached Appendix at A-41). The testimony of these former City officials constitute adequate, substantial and credible evidence supporting the factual findings of the trial court. The record below established to the satisfaction of the lower courts that legitimate governmental interests were served by the sign regulation and that the enactment reasonably advanced those interests in accordance with the legal standards set out in the caselaw.

CONCLUSION

No compelling reasons exist to grant Intervine's Petition for a Writ of Certiorari. Upon careful review, Gloucester City's ordinance does not violate the Petitioner's first amendment rights as enunciated and protected by this Court in Metromedia, Inc. v. San Diego. Furthermore, the lower courts' decisions do not contradict the decision of another state court of last resort or of a United States Court of Appeals on the issues of the First Amendment, severability of the municipal ordinance or whether the City failed to consider less restrictive means of regulating commercial speech.

Based on the foregoing, The City Of Gloucester City respectfully requests that this Honorable Court deny Intervine's Petition for a Writ of Certiorari.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

April 14, 1995

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Re: Intervine Outdoor
Advertising, Inc.

v

City of Gloucester
City Zoning Board of
Adjustment and City of
Gloucester City
Docket # L-013091-92

Dear Counsel,

This is an action in lieu of prerogative writs in which the plaintiff, Intervine

Outdoor Advertising, Inc. (Intervine), an applicant for a use variance (N.J.S.A. 40:55-70(d)) and a bulk variance (N.J.S.A. 40:55D-70(c)) alleges that: (a) the Board of Adjustment (Board) and the City of Gloucester (City) failed to review their master plan within the statutorily prescribed six year period of time (N.J.S.A. 40:55D-89); (b) the Board was arbitrary, capricious and unreasonable in its denial of Intervine's application for a variance and (c) the City abridged Intervine's federal and state constitutional right of freedom of speech by enacting its ordinance which prevents the erection and utilization of billboards within its geographical boundaries. U.S. Const. Amend. I, and N.J. Const. Art. I para. 6.

A. Review of Master Plan

Pursuant to N.J.S.A. 40:55D-89, a local "governing body shall, at least every six years, provide for a general reexamination of its master plan and development regulations by the planning board. . ." The plaintiff has presented the court with allegations couched in the phrase "upon information and belief" and without certification of any facts that the City and Board violated the mandate of the statute. However, the Board of Adjustment has provided the court with the City's resolution which attests to a reexamination conducted in December 1989, and the re-adoption of its Master Plan at least eighteen a prior to plaintiff's application.

Based upon the quality of the record before the court, a case has not been submitted by the plaintiff which would give rise to the

imposition of sanctions as expressed in N.J.S.A. 40:55D-89.1. The attack against the ordinance is completely inadequate to abrogate the presumption of validity which necessarily attaches to it.

B. Use and Bulk Variances

I

Intervine is a company engaged in erecting and maintaining freestanding, outdoor advertising structures. Intervine has entered into a tentative agreement to lease the property which is the subject matter of its application. The premises are located in an area zoned for industrial use as defined in its master plan. The property includes a large marsh area all of which is owned by Intervine's prospective lessor, except for several residences. This property is described in the City's zoning ordinance at Article XVI as being located in a "Port and Cargo Handling Zone." Additionally, the premises are located immediately adjacent to the Walt Whitman Bridge, which runs East and West across the Delaware river. This bridge is owned and operated by the Delaware River Port Authority. The westerly portion of the bridge is in Philadelphia, Pennsylvania and the easterly portion in Gloucester City, New Jersey. Large billboards of the type sought to be used by Intervine are presently located on the Philadelphia side of the bridge, but none exists on the New Jersey side. As stated by applicant's counsel at the hearing of September 10, 1992, "there's more signs on the Philadelphia side than you can count".

Along side of this bridge and within the City of Gloucester, Intervine desires to

construct three double-faced, free standing pole signs, one on the south side of the bridge and two on the north. These proposed signs would be 16 feet high and 60 feet wide and their faces would perceptually be parallel with the bridge. One pole is to support each sign. The bottom of the signs would be 25 feet above the road surface of the bridge and approximately 90 to 131 feet from the ground. Therefore, the highest point of these signs from ground elevations could be from 131 to 172 feet. Each pole would be at least five-to six feet in diameter.

Geographically, Gloucester city is bounded on the North by the Walt Whitman Bridge and the main branch of Newton Creek; on the East, by Haddon Township and the Borough of Mt. Ephriam; on the South, by Big Timber Creek; and on the West, by the river Delaware. Within these boundaries the city is fragmented by four major thoroughfares, each of which traverses the area in a generally north/south direction. They are, Broadway, West Jersey Seashore R/R line, the North/South freeway and State Highway 130.

Historically and demographically, Gloucester was an industrial city but is now primarily a residential one with a substantial portion being welfare dependent. The city is trying to recapture its historical significance and is in the process of developing the King street area which is one of the entry ways to the city and is very close to the area in dispute.

II

If the use for which a variance is sought is not one that inherently serves the public good, the applicant must prove and the board must specifically find that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use. Medici v. BPR Co., 107 N.J. 1 (1987).

The applicant has admitted that the erection and use of a billboard is not inherently beneficial. However, it contends that the record shows by the required enhanced quality of proof that the intended use promotes the general welfare, and as a result of such proofs, the contrary conclusion by the board must be declared as arbitrary, capricious and unreasonable.

The proofs on this element can best be digested by referring to the transcript of the proceedings and the arguments of applicant's counsel. At the October 8, 1992 hearing the attorney stated, as a part of his summary to the Board, the following:

> Billboards and outdoor advertising play a very unique role in our society, in our economy, and today I think we're all aware that we're involved in a very deep recession, probably a lot of people in here would call it a depression. Outdoor advertising

stimulates commerce. It will also--in the proposal we set forth it will also bring cash flow into the coffers of the City of Gloucester in helping it to better this area.

. . .we're here to make a profit, but we realize to be profitable, we have to coexist with our neighbors, and in that sense we'd like the people here to know that we are sincere in our application. We're not here to take advantage of anyone. We're here for a profit motive, but that's part of the American way. Everybody here similarly has a job and they do it because they want to make a profit, but we're here also just to acknowledge the fact that we need-- we need relief from the Board, and we also really need relief from the citizens here to construct these signs. And, we're -- just -- my point is we're not here to take advantage of anyone. (Emphasis added)

> . . . The economic benefit to the applicant is not a good reason for granting a variance. We believe that these signs benefit the economy as a whole. They create commerce. They stimulate commerce. That's the reason why you put them up, so that people will see them and go buy X brand of soda or they'll buy X brand of whatever or they'll go to X casino or they'll do this or do that. They have a benefit to society.

What may be considered as a response to the applicant's assertion that there is a general public benefit derived from the existence of billboards, were the statements made at the public hearing by one of the residents, who, during his presentation, referred to published data:

> I just want to say one thing here. In August the

2nd, 1987, in the Philadelphia Inquirer a William Eckinburger called The Great Terrain Robbery and called billboards the junk mail of the American highway, which they really are.

. . . I'd like to read these four paragraphs. It says, "Four states: Hawaii, Alaska, Vermont and Main (sic) ban billboards. For the rest of the nation motorists find (sic) one-sided battle between scenery and signery. Contrary to industry propaganda, most of the information in part on billboards will be irreverent (sic) to the immediate purposes of their captive audiences... Americans seem to have forgotten to use the ugly -- have seem to have gotten used to the ugliness of billboards with the same indifference that munitions' workers develop towards dynamite, yet it appears certain that given the choice they would get rid of billboards. Whenever a referendum on the issue have (sic) appeared on

election day the overwhelming and popular vote was against billboards." If I go to down here it says, "A lot of people are indifferent to billboards. They have been a part of the scene so long that some people will take their offensiveness for granted, but any time the people are given a choice, wherever the issue has gone to popular referendum: Jacksonville, Tucson, Anchorage, Houston, Beaufort County, South Carolina, the vote goes overwhelmingly anti billboard. One of the great issues in this country right now is what is happening to the land, and billboards are one of the bad things that is happening to the land. Billboards erode our quality of life, flute our landscape, undermine our sense of place, and if every billboard disappeared from the face of the earth tomorrow no one would miss it."

(October 8, 1992, transcript, pages 63-65).

On the question whether the applicant has carried its burden of proof that its intended use promotes the general welfare of Gloucester City, this court's review of the record indicates that such record clearly supports the Board's determination that the grant of the variance would not promote the general welfare of its community. The record is totally void as to how the advertisement of various "colas", other consumer products and Atlantic City, New Jersey gambling directly benefits Gloucester City. What is clear from the record is that the applicant and the prospective lessor are the persons who will directly and significantly benefit by the construction and erection of the billboards. The purpose of the billboards is simply to make money, as honestly stated by applicant's counsel, who only attempted to change that assertion after counsel for the Board brought to his attention that such motive was an inappropriate one. Therefore, it's fair to conclude that the true purpose had already been stated. The value of the applicant's after - the - fact attempt to assign a different, purpose is quite minuscule at best. The general welfare of some community remote from the community wherein the application has been lodged or the benefit to some commercial entity which has no presence in the affected community is not the general welfare about which the law requires a local community to direct its attention when considering a use variance.

In addition to the above requirement, the applicant must show by the requisite proofs that the grant of a use variance is not inconsistent with the intent and purpose of

the master plan and zoning ordinance. Article 16 section 1603 of the ordinance, from which the applicant seeks relief, reads, in pertinent part, as follows:

> The text of all signs shall be limited to identification and functional purposes only. Identification signs shall contain the principal name of the establishment, firm or proprietor, its address, and a brief description of the goods or services offered. The text of a sign may also include a logogram or symbol of the use which it identifies. (1603 -2)
>
> No sign except functional signs, shall be located within twenty (20) feet of the existing or proposed right-of-way of any public road or street. (1603-5)
>
> No sign shall exceed twenty (20) feet in height. (1603-6)
>
> No sign shall be illuminated between the hours of 10 p.m. and 7 a.m. the following morning, unless the business or use so advertised is open to the

> public later than 10 p.m. in which case the establishment may keep its sign illuminated until the business closes, but not after. (1603-12)

The intent and purpose of the ordinance clearly seems to be to limit the size and place signage can be displayed and the length of time such signage can be artificially illuminated. Also, it is the intent of the ordinance to limit the subject matter of the signage to the purposes for which the property is being utilized, other than directional or "functional" purposes which are permitted.

From the record, it is clear that another purpose of the ordinance was to maintain some meaningful level of aesthetics in the community as a whole. Each party has conceded that aesthetics is an appropriate element to discuss when considering an application for use and bulk variances.

The question, therefore, becomes whether the applicant has shown, by the requisite proofs, that which they propose to do is not inconsistent with the intent and purpose of the master plan and the zoning ordinance.

The applicant produced a professional planner who opined that the construction of a billboard in the affected area was consistent with the master plan. He arrived at this conclusion by stating that "[t]he objective for the industrial port area is to reclaim as much of that area as possible for additional ratables for additional -- by using mixed

uses. Clearly, we're adding a use that is not there now that is going to increase the utility of this very small area parcel in a way that will have no -- I believe no significant impact -- no appreciable impact on the City or the public." In response to this testimony, a board member asked, ". . . are you saying that that will increase the real estate ratable value of that piece of property?" The witness replied, "Some, slightly."

One of the reasons for the applicant's contention that the Board was arbitrary and capricious was that they did not produce an expert who countered this testimony. Whatever the reason for not producing an expert to counter this testimony, the record clearly indicates the lack of a necessity to do so. The opinions given by the expert are totally unsupported by any fact. Nonexistent data can not be challenged. Each opinion is a net opinion and, as such, can not shift a burden to the Board to respond. It must not be forgotten, that it is the applicant who has the burden of proof, not the Board. See Tomko v Vissers, 21 N.J. 226, 238 (1956) and Chirichello v Zoning Board of Adj. Monmouth Park, 78 N.J. 544 (1979). The expert did not attempt to convey to the Board how construction of billboards would develop the port area when such billboards were to be utilized to advertise general commercial products unrelated to the port; for example, alcoholic beverages, "colas" and seashore gambling. There was public concern expressed that once billboards are erected, the area surrounding them could not and would not be developed. The prevention of development is

the antithesis of what the applicant's expert opined was the purpose of the Master Plan. It is also clear from the record that the Board was totally disenchanted with the owner of the lands since it has done nothing to develop the area. The expert did say that putting up billboards would be a new form of use which would constitute a mixed use permissible under the ordinance. However, just because billboards would be a different use, and therefore a "mixed use", does not answer the question whether the billboards are inconsistent with the Master Plan or the Zoning Ordinance. The possible lack of development, because no one would develop property in close proximity to a billboard, is totally inconsistent with the master plan, not consistent with it because it would become a mixed use, as opined by the applicant's expert.

Taking the record as a whole, it adequately supports the Board's conclusion that the applicant had not carried its burden of proof on the question whether the proposed use was consistent with the intent and purpose of the master plan and zoning ordinance.

Having failed to meet its burden with regard to these two elements, the Board was correct in its conclusion, and the record substantially supports the same.

C. Constitutionality of Ordinance

Intervine contends that Gloucester City's ordinance is facially and constitutionally infirm in that it allegedly infringes upon its first amendment and freedom of speech rights.

I.

Since it is the philosophy of our courts not to reach and determine a constitutional issue unless absolutely imperative in the disposition of litigation, Donadio v. Cunningham, 58 N.J. 309, 325-26 (1971)--the "strict necessity" doctrine--this court must determine whether in fact the issue should be broached.

The applicant relies upon Bell v. Stafford Tp., 110, N.J. 384 (1988) for the proposition that Gloucester City does not had the right to prevent billboards in its community. Although Bell did not quote from the ordinance it was considering, there can be no doubt from the reading of the opinion that the ordinance must have specifically forbidden the erection of billboards within the township. Because of this blanket prohibition and the inadequacy of the record in showing that there was a significant governmental interest being advanced and that alternative means were available, the court declared the ordinance to be constitutionally infirm.

In this case, billboards are not mentioned in the ordinance; although, it is clear from the record presented that the township does not want any signs which by their nature would adversely impact upon its ability to reclaim and develop its town and would constitute an excessive amount of visual pollution. Also, it is clear from the ordinance that the size restriction of 100 square feet and the height restriction of 20 feet would essentially prevent Intervine from advertising on the

scale that its application projects. It desires to erect three double-faced signs of 960 square feet each; all of which are from 131 to 172 feet from ground level.

If this court had only the "c" (bulk) portion of the application to consider, then most assuredly, the doctrine of "strict necessity" would be applicable and this court would limit its analysis to the adequacy of the record related to the denial by the Board. This is so because sixty square feet of space can not be said to be a facially destructive attack against one's freedom of speech. As already discussed, the record below is adequate to support the denial of the requested "c" variance. Additionally, there can be no question that a municipality may regulate the noncommunicative aspects of signs sought to be erected within its geographical boundaries. See Metromedia, Inc. v. San Diego, 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981) wherein the court stated;

> But whatever its communicative function, the billboard remains a "large, immobile, and permanent structure which like other structures is subject to . . . regulation.", (citation omitted). Moreover, because it is designed to stand out and apart from its surroundings, the billboard creates a unique

> set of problems for land-use planning and development.
> Id. 69 L Ed 2d at 811.

Even if one were to conclude that the doctrine should be applied, Schaad v. Ocean Grove Camp Meeting Ass'n 72 N.J. 237 (1977), overruled on other grounds, suggests that courts may in some cases address the constitutional question despite the absence of a strict necessity for doing so. Because the applicant has made the constitutional question a substantial portion of its argument, although not so in its complaint, and because the question of whether a commercial speech applicant has standing to raise noncommercial speech questions has evolved, prudence would dictate that the issue be addressed. In addressing this issue, Shaad, supra., at 251, is quite instructive.

> . . . where there is more than one potential constitutional basis for invalidation of a restriction based upon a statute and a dependent ordinance, as here, a court should, ordinarily, lean toward that ratio decidendi in judgment which will save as much of the statute and ordinance or of the range of their application, as possible, and rest its invalidation thereof on the narrowest

basis consistent with relief to the successful suitor.

The applicant contends, at, least inferentially, that the ordinance is infirm because one can only advertise subject matter that relates to the use of the business located on the property. Section 1603 (2) suggests this limitation. The transcripts of the hearings below clearly show that there is no desire by Intervine to advertise about any activity being conducted on the land on which the signs are to be placed. Also, and inferentially, because not argued, the size of the permissible signage in the community would only represent approximately 11% of the area desired by the applicant. Therefore, Intervine contends that these two factors impermissibly infringe upon its commercial freedom of speech.

Even though one may argue that this court's affirmance of the Board's denials of the "d" and "c" variance applications disposes of the matter, it is the opinion of the court that the constitutional questions raised by the two assertions should not be completely surrounded by and cloaked with the doctrine of strict necessity and thereby avoid their resolution.

II

Without a detailed history, it is sufficient to state that "[p]rior to 1975, purely commercial advertisements of services or goods for sale were considered to be outside the protection of the First Amendment.", Valentine v. Chrestensen, 316

U.S. 52, 86 L. Ed.1262, 62 S. Ct. 920 (1942). However, the law has developed to such an extent that the United States Supreme Court has stated,

> The Constitution. . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.
>
> Central Hudson Gas & Electric Corp. v Public Service Comm'n, 447 U.S. 557, 65 L.Ed. 2d 341, 100 S. Ct. 2343 (1980), at 562-563, 65 L. Ed. 341.

To determine the validity of government restrictions on commercial speech as distinguished more fully protected speech, the Court, in Central, adopted a four-part test. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. Metromedia,

Inc. v. San Diego, 69 L Ed. 2d 800, 815, citing Central.

There obviously can be no contention about the first and second criteria. There is no suggestion that the commercial advertising sought to be instituted will involve unlawful or misleading activity. With regard to the second criteria, the record below is replete with municipal concern about traffic hazards and aesthetics. The Delaware River Port Authority submitted their written objections for consideration by the Board, in which they expressed their concern regarding traffic. The applicant presented its expert who expressed opinions that the signs would have minimal or no impact upon traffic because of the proposed locations and because of the speed with which people can read and at the same time drive.

Our Supreme Court has "deemed aesthetics to be relevant when they bear in a substantial way upon land utilization." United Advertising Corp. v. Metuchen, 42 N.J. 1, 6 (1964). In Metromedia,Inc. v San Diego, supra., at 815, it was stated that it is far too ate to contend that either traffic safety or esthetics are not substantial governmental goals. That court has also found that the question of whether billboards have an impact on traffic safety is somewhat settled. Chief Justice Berger, dissenting in Metromedia at page 848, fn 2, stated that "Congress, too, has recognized the dangers to safety and the environment posed by billboards . . . ", citing to The Highway Beautification Act of 1965. It already being determined that these goals are valid as a matter of law and that

the relationship of billboards to traffic safety is fairly well established, there only remains the requirement that the record below support the conclusion that each was a goal of the municipality. The record below including the testimony to which the court previously alluded elsewhere in this opinion, adequately and reasonably support the existence of these municipal goals.

With regard to the fourth aspect; that is, the ordinance reaches no further than necessary to accomplish the given objective, Metromedia is quite instructive. Basically, it holds that if a sufficient basis for the municipality believing that billboards are traffic hazards and are unattractive (and this court has found such to be the case) then the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. It went on to say in Metromedia, "The city has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends." Gloucester City has not gone as far as perhaps it could because its ordinance does permit signs within the community. Since the record supports the Board's finding that the proposed billboards would constitute a traffic hazard and nothing short of visual pollution, this fourth aspect has been met.

The final aspect is the third Central Hudson criteria: Does the ordinance "directly advance" governmental interests in traffic safety and in the appearance of the city? It is the opinion of the court that it does, notwithstanding the opinion of the applicant

that the record is void of any basis for the Board's conclusion.

This court has the required hesitancy to disagree with the accumulated, common-sense judgments of the Board, just as other reviewing courts have concluded when called upon to review whether billboards are real and substantial hazards to traffic safety. See Metromedia, supra, at 816. With regard to aesthetics, Metromedia held that "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm." Id at 816. Aesthetic judgments are necessarily subjective and defy objective evaluation; however, a close inspection of the record below clearly indicates that the judgments of the Board and the City are not public rationalizations of an impermissible purpose, but a resolve to revitalize their community and recapture its historical significance. This court has not lost sight of the fact that the City is relatively poor in all its physical aspects and that the area concerned in this case is industrial in nature. However, the status of the law is not such that a community must be like historical Williamsburg in order to sustain a prohibition against billboards. The older portions of our major urban areas "should not be prevented from taking steps to correct, as best they may, mistakes of their predecessors." Medtromedia, at 854 (justice Rehnquist, dissenting). This seems from the record below to be the purpose of the city's ordinance.

Gloucester City, by permitting onsite advertising but prohibiting offsite advertising has obviously concluded that a commercial enterprise--as well as the interested public--has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. Metromedia, Inc. v San Diego, supra at 817, citing Railway Express, Inc. v. New York, 93 L. Ed. 533, (Jackson, J., concurring) and Bradley v Public Utilities Comm'n, 289 U.S. 92, 97, 77 L. Ed. 1053, 53 S. Ct. 577. This is especially so in this case where the noncommunicative aspect of the advertising (the billboard structure) is of such a nature that it would substantially destroy the use for which the City had determined the property should be put and as set forth in its master plan.

The distinction drawn by the municipality is an appropriate one. As the Metromedia-court concluded, " . . . offsite commercial billboards may be prohibited while onsite commercial billboards are permitted. In other words, and more definitively stated in this case, offsite commercial signs may be prohibited while onsite commercial signs are permitted. The distinction drawn by the City does not strengthen any argument that the applicant has presented in its request for a declaration of constitutional infirmity.

Accordingly, it is the opinion of this court that Gloucester City has resolved the conflict "between its land-use interests and

the commercial interests of those", such as the applicant, who is "seeking to purvey goods and services within" and outside of the city in favor of those interests set forth in its Master Plan. Metromedia, supra at 818. This court can not conclude from the evidence submitted that the City has drawn its ordinance broader than is necessary to meet its interests, or that it fails directly to advance substantial government interests. From the arguments and evidence presented, Gloucester City has met its burden and it has been clearly shown that a sufficiently substantial governmental interest is furthered by the scope of the ordinance. Therefore, the City's ordinance insofar as it regulates commercial speech meets the constitutional requirements of Central Hudson, supra.

III

The question which now presents itself is whether this court should reach and dispose of the noncommercial speech question raised by Intervine. It is the opinion of this court that it is not necessary to reach this question, even though the Ordinance has created exceptions which allow "Temporary signs announcing or advertising any political, educational, charitable, civic, professional, religious or like campaign or event for a consecutive period not to exceed sixty (60) days in any calendar year, providing they do not exceed fifty (50) square feet in size."

This exception is so broad that it seems to cover such a broad area of possible human discourse, that a conclusion that it infringes upon the applicant's First Amendment rights is

not reasonably supportable. Additionally, the permissible limitation in size is so far removed from what the applicant desires, it can not be held that Intervine's interest with regard to this specific question is even remotely significant, and the applicant has not presented such a position. Also, there is not a shred of evidence that on-site signs covered by the ordinance have ever been used for noncommercial messages nor are such signs at issue in this case. Further, there is no evidence in this case that remotely suggests that the City, by creating these few exceptions, is attempting to influence public opinion or to limit public debate on particular issues. Most assuredly, such conclusion can not be derived from the face of the ordinance. An attack on this ordinance on the basis of noncommercial speech infringement must await the time when the question is ripe for consideration and is under direct attack. Likewise, there is not a shred of evidence that alternate means of communicating do not exist.

In Schaad v. Ocean Grove Camp Meeting Association, 72 NJ 237, 251 (1977) citing Chief Justice Marshall while he was sitting on the circuit bench, the court said:

> No questions can be brought before a judicial tribunal. of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the

> court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires that the obligations of its laws should not be unnecessarily and wantonly assailed. Ex parte Randolph, 20 F Cas. pp. 242, 254 (No. 11,558) (C.C.D. Va. 1833).

Gloucester's ordinance should not be ripped apart on alleged constitutional grounds when the ordinance can be preserved to the extent necessary to resolve the crucial question before the court. There is no necessity to go further into the analysis of the ordinance where there has not been any proof that the applicant's non-commercial interests have been offended by the ordinance as drafted.

CONCLUSION

The applicant's motion for summary judgment is denied and it's complaint is dismissed with prejudice for the reasons set forth.

THEODORE Z. DAVIS